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INTERNATIONAL LAW

AS INTERPRETED DURING

THE RUSSO-JAPANESE WAR.

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INTERNATIONAL LAW

AS INTERPRETED DURING

THE RUSSO-JAPANESE WAR.

shelved under

BY

F. E. SMITH, M.A., B.C.L.,

FORMERLY FELLOW OF MERTON COLLEGE, OXFORD,
AND VINERIAN SCHOLAR IN THE UNIVERSITY;
OF GRAY'S INN AND THE NORTHERN CIRCUIT, BARRISTER-AT-LAW;

AND

N. W. SIBLEY, B.A., LL.M., TRIN. H. CANT.,

AND B.A. LOND.,
OF LINCOLN'S INN AND THE NORTHERN CIRCUIT, BARRISTER-AT-LAW.

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INTERNATIONAL LAW

AS INTERPRETED

DURING THE RUSSO-JAPANESE WAR.

INTRODUCTORY.

THE points on which international law differs from law proper are almost as familiar as the points of resemblance. It possesses in a high degree many of the attributes which spring most readily to the mind which dwells upon the conception of law. It is deficient, however, in the one element which is of greatest practical importance. Nor is the deficiency discoverable merely by the nicely trained analysis of a disciple of Austin. A very ordinary type of mind, quite unfamiliar with the technical meaning of the missing "sanction," is able to appreciate the distinction with remarkable clearness. A British shipowner with a commercial quarrel upon his hands is comfortably familiar with its development from the issue of his writ until the delivery of judgment in the Commercial Court. The same man is conscious of unplumbed depths, of disagreeable and, worse still, of incalculable possibilities when he learns that his vessel must abide the issue of a tribunal in session at Vladivostock or Tokio to administer law, the very rules of which are often, before the event, unknown to his professional adviser. Such a man must often have reflected with bitterness, when offered the stone of diplomatic remonstrance, upon the irony latent in the term law of nations. The merchant who continues his trade

in provisions to a Japanese port which is hundreds of miles remote from the seat of belligerent operations, is advised in England that his traffic is innocent. When confronted with the arrest and, if he be unusually unfortunate, the destruction of his vessel, he is likely to realize the defect of a so-called law unillumined by the penetrating Roman maxim, *nemo potest judex esse in re sua.*

It is, moreover, highly important to observe that the branch of international law which has engaged the attention of prize courts is the very part of the system which exhibits the most numerous points of analogy to law proper. If it fails here there is little hope for the more important residue, which is concerned not with the claim of foreign traders, but with high matters of national policy. In civilized countries prize courts invariably profess, and commonly attain to, a high standard of adherence to established principles. The abstract view was very clearly stated by Lord Stowell,[1] whose practice was inflexibly consistent with his theory.

"In forming this judgment I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm—assert no pretension of the part of Great Britain which he would not allow to Sweden in the same circumstances, and to ignore no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and

[1] The *Maria*, 1 C. Rob. at p. 349.

which I mean should be considered, as the universal law upon the question."

It might be thought that a code of rules honestly administered upon these principles would be fairly entitled to the term of law. Yet even here, in the least assailable side of international law, a fundamental qualification is required. To justify the conception of law not only must the judge be honest and the principle judicial, but the system administered must be stable, consistent with precedent, and, above all, unsusceptible of variation at the hands of the litigant, *i.e. ex hypothesi* the belligerent Power of whose jurisdiction the tribunal is the creation. If the judge be disposed and constitutionally authorized to decide matters coming before his prize court with complete indifference to the transient claims of the belligerent's policy, we have a fairly close approximation to law with its twin connotations of regularity and coerciveness. To take a simple illustration. If a Russian judge decides the fate of an English prize by reference to the well-established principles out of which the rule of international law has been gradually shaped, he exercises functions comparable to those discharged by any other judge of law. If, however, he professes himself, or is in fact unable, to challenge the legality of a manifesto promulgated *ad hoc* by his Government, *e.g.* a list of contraband articles, he ceases to administer law, and becomes the creature of a system which is the very negation of law.

The matter becomes still clearer when examined from the point of view of disputes, not between belligerent nation and neutral individual, but between nation and nation. It is, of course, true that here, as elsewhere, there exists a mass of quasi-authority to which deference is at least ostensibly paid, but no one who has been professionally familiar with litigation will be deceived either by this circumstance or by the legal dress in which diplomatic disputes are commonly conducted. Even if the assumption be made that the rules of international law are as well ascertained as those of a scientifically codified modern system (an assumption which is notoriously inconsistent with the facts), the so-called

"adjective" portion, or that branch which is concerned with the enforcement of remedies, remains entirely deficient in the first postulates of every civilized system of jurisprudence. In other words, even an agreed code of rules is useless unless reinforced by an indifferent tribunal for the purpose of finding the facts. Every practising barrister knows how seldom he meets with a case in which the issues are purely legal, and how necessary it is for the tribunal to find certain facts before the legal issues involved can be usefully discussed. A simple illustration makes the distinction clear. A and B are litigants in an English Court. Their counsel are in substantial agreement as to the law applicable to their dispute, but A's witnesses give one version of the facts and B's another. The judge hears the evidence, finds the facts one way or the other, and has little difficulty in determining the considerations of law which govern the facts as found. Substitute Russia and Japan for A and B, and consider the course of events. The diplomatic correspondence is long and sterile because each disputant continually repeats his own version of the facts, and dilates upon the law appropriate to these facts. Progress is impossible simply because there is no method of dealing with these preliminary issues. The clearest code in the world is of no use to litigants who are in controversy as to the facts, and are equally entitled to insist upon their own version. These considerations are so familiar that we are in some danger of missing their significance. In fact, they suggest the conclusion that convenience has placed international law upon a pedestal which it has little claim to occupy. Suppose, for instance, a universal admission by all competent international authorities that Russia was right and Japan wrong in the controversies which preceded the present war. Conceive that all the jurists, from Grotius downwards, agree with the consistent stream of international practice to vindicate the pretensions of Russia. Yet, so far as international law is concerned, Japan is entitled to put her quarrel to the hazard of the sword. To parody the title of a valued convenience in the jurisprudence of Rome, there is *legitimatio per subsequens bellum*. And if Japan were to succeed

in a war with such an origin, her victorious armies might march in conquest to Moscow without violating any rule of international law.

To summarize the above views: international law consists of rules to regulate relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness. But it none the less remains broadly true that it is deficient in that coercive side of the term law which is above all others essential and characteristic. All civilized nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, they are not infrequently broken, and breaches may be consecrated by adding successful violence to the original offence. In reality the sources of its strength are these: (1) A regard which in a moral community often flickers but seldom entirely dies, for national reputation is affected by international public opinion; (ii) an unwillingness to incur the risk of war for any but a paramount national interest; (iii) the realization by each nation that the convenience of settled rules is cheaply purchased on the whole by the habit of individual compliance.

The outbreak of war between Russia and Japan was naturally of interest to all who follow the development of public law. It was scarcely conceivable that a prolonged and arduous campaign, both by sea and land, should be fought out without testing and modifying many rules which have been repeated in the text-books. The personality of the opposed nations rather widened than otherwise the possibilities of the struggle. On the one side was Russia, the convener of the Hague Conference, the builder, in a figurative way, of the nineteenth-century Temple of Peace. For Russia, indeed, the latter *rôle* was a novel one. Historically, her efforts in the direction of consolidating and adhering to the law of nations have been neither conspicuous nor successful. It is not yet forgotten how, in 1870, when the hands of Europe were tied by the Franco-Prussian War, Russia, without the slightest ground of excuse, repudiated the solemn treaty of 1856, and indirectly

struck a blow at the whole treaty law of nations. In later years her Far-Eastern policy has furnished a sinister commentary upon the Hague proposals. International law is not indeed concerned—at least not until invoked by China—with the repeated breaches of faith which marked the acquisition and growth of Russian influence in Manchuria; public, like municipal, law hands over to the censure of the moralist the man who merely says the thing which is not. Open conquest in these regions would have been legal, as we have seen above, but it would have been impolitic and difficult; the world was therefore treated to the idle fiction of leases, and a new refinement was added to the conceptions of international law.

The record of Japan in international matters was of a very different character, but here again there were in existence many factors making for uncertainty. The civilization of the West, widely diffused as it was known to be in Japan, was nevertheless a plant of recent introduction, and there were some who doubted whether it would be proof against the savagery excited by warfare even among the most cultivated nations of the world. Others — and amongst their number were many who know Japan best—pointed to an escutcheon kept with one single exception stainless during the trying struggle with China, and predicted that the nation which had preserved its dignity in the face of her humiliation at Port Arthur, which had never forgotten the language of courtesy and patience in the exasperating negotiations with St. Petersburg, would observe with scrupulous correctness the rules of international law as understood by the experts at Tokio.

The struggle has now been in progress for a period sufficiently long to justify an examination of its bearings upon the doctrines of international law. Many points of novelty have arisen and, what is more important, one or two questions of far-reaching principle. The former are dealt with at length in the following pages, but it is perhaps convenient to indicate the latter in this place. Under this head it may be confidently stated that the real significance of this war from the point of view of public law lies in the indifference with which

Russia has treated the rights of neutrals, as those rights have been hitherto understood. The undiscriminating comprehensiveness of her list of contraband articles, her repudiation of the distinction between conditional and unconditional contraband, her claim to destroy neutral vessels upon provocation so extremely slight, and, finally, her bold contention as to the status of the volunteer cruisers, suggested decisively that the Russia of 1904 is still in essentials the Russia of 1870. The force of these reflections was increased rather than lessened by the fact that the Russia responsible for those usurpations upon neutral rights was, at least for the moment, a defeated power. Had she been in the flush of conquest and in possession of the sympathy of France and Germany, it may well be doubted whether any concession would have rewarded the efforts of British diplomacy. And yet many of the pretensions advanced on behalf of Russia were in conflict, as will be seen hereafter, with the whole weight of authoritative opinion from Grotius down to Lord Stowell.

It may indeed be asked whether the reference to authority, which is so frequent in the pages that follow, is of practical importance in the present condition of diplomatic controversy. Did the cogency of Grotius disappear at the time when Homer lost his vogue in the House of Commons? The answer is, perhaps, that after a period of reaction against excessive overvaluation the opinions of jurists are now considered with a stricter sense of proportion. Their views are valuable in proportion to the personal weight of the writer, and still more to unanimity among authorities belonging to different nations, and presumably under the influence of different preconceptions. It is, indeed, hardly conceivable that men of action—men of the Bismarck type—will be deterred from a course which promises advantage by the admonitions of Grotius and his successors. They are more likely in Bismarck's methods to employ a diligent student to discover in the vast literature of the subject a more favourable opinion. Even so moderate a statesman as Lord Salisbury pronounced that international law depended generally on the prejudices of the writers of text-books. It may be assumed that when authority is nicely

balanced, so that a plausible argument is possible on either side, the man of affairs will not embarrass himself by weighing too scrupulously opinion and counter-opinion. He will choose his course at the moment, and collect the authorities at his leisure. It is, however, in one way almost as important as it ever was to note both the current of national practice and of expert opinion in questions of public law, because public opinion is strongly influenced in all civilized countries by the views of those who profess a special familiarity with its problems. The practical importance to-day of citations from the old jurists lies in the respect still paid to them in the pages of the better known text writers, in diplomatic correspondence, and so ultimately in that international public opinion which is, after all, the strongest bulwark of international law. For these reasons it has been thought useful and, at least, historically interesting to examine in the following pages the various points which have arisen in the light of similar controversies which have preceded them, and the discussions provoked by such controversies. It is apparent that the most important of the questions under consideration have concerned Russia on the one hand, and a neutral nation on the other. Japan has only once been brought into direct collision with public opinion, and even on that occasion the voice of authority was almost equally divided. The considerations involved in what is commonly known as the cutting-out incident are discussed in detail elsewhere. It may be fully conceded that the curiously artificial situation created by the partial neutralization of China by the belligerents lent strong support to the contentions put forward in the official Japanese apologia, but it is none the less permissible to regret that Japan should even for a moment have stood in the debatable land of international subtilties. Throughout the war her attitude has been one of intelligent correctness, "giving nothing away" in the current phrase, but taking no liberties with accepted international practice. Few subjects in the astonishing curriculum of Japanese education have proved more attractive than the study of law. The law students in the University of Tokio are far more numerous

than those of any other faculty, and it is stated that public law and international law are the favourite subjects of research. From the moment that Japan successfully asserted her claim to enter the concert of civilized nations she set aside some of the finest minds in the country to become the vigilant guardians of her international legality. She left as little as possible to the international law of the quarterdeck, and it is reported that jurists were attached to the staffs of her marshals to instruct and advise them in the subject of their particular study. Thus, in the Chinese War, Professors Takahashi and Uriga were appointed respectively to advise the navy and army,[1] and in their accounts of the questions which arose for discussion made a permanent addition to the literature of the subject. It is, perhaps, not fanciful to trace in the masterly documents which have from time to time been put forward by the Imperial Government, the skill and experience of specialists who have given their lives to a particular study, and who enjoy in Japan a practical influence which is hardly conceded elsewhere. The conjecture may, perhaps, be put forward that had the relations of Russia with neutrals been determined by men with the learning and experience of Professor Martens instead of by a council commonly supposed to contain an excessive proportion of grand dukes, the controversies provoked by the war would have been at once less frequent and less bitter.

[1] *Times*, Oct. 6, 1904.

PART I.

THE NORMAL RELATIONS OF RUSSIA, JAPAN, CHINA, AND TURKEY.

CHAPTER I.

BELLIGERENT OPERATIONS IN NEUTRAL TERRITORY IN THE RUSSO-JAPANESE WAR.

Such facts arising out of the events of the war as illustrate the principle that neutral territory must not form the basis of belligerent operations, may be conveniently divided into those which relate to Manchuria, Korea, and China respectively. The facts relating to Manchuria and Korea are somewhat complex, and from the first have been recognized as presenting problems of great difficulty in the light of international law.

Normal relations of Russia, China, and Korea.

It will be convenient to examine first by what right the Russians have rendered Manchuria, as Belgium was in the Great War, the battlefield of nations other than the territorial sovereign.

Status of Russia in Manchuria.

At the conclusion of the Chino-Japanese War of 1894–5, by the Treaty of Shimonoseki, April 16, 1895, China agreed to cede the Liao-tung peninsula, on which Port Arthur is situate, to Japan, besides paying her 200 million taels. Russia, Germany, and France interposed, and objected to the retention of any territory on the mainland by Japan. The victors had, therefore, to be content with the acquisition of Formosa and the Pescadores Islands, and an additional indemnity of thirty million taels.[1] When Russia ultimately acquired the Liao-tung peninsula in 1898, Mr. Balfour reminded the House of Commons that the Russian objection to a Japanese Port Arthur was that it would have been a constant menace to the capital of China, dominating, as

Japan acquires Port Arthur by Treaty of Shimonoseki.

Intervention of Russia, France, and Germany.

[1] "Annual Register," 1895, p. 343.

it did, the maritime approaches to Pekin. Subsequent events cast a significant light upon Russia's action in 1895. Sir W. Harcourt observed of intervention that "its essence is illegality, and its justification is its success." An intervention, like that of Russia in 1895, can hardly be called successful when, within a single decade, it has the effect of committing the State which intervenes to a mortal struggle with one of the parties whose action gave rise to the intervention. It is difficult not to regard her action in 1895 as not merely the overbearing, but even the exclusive, cause of the great war of 1904. Though the intervention of 1895 succeeded in its immediate object, it perhaps illustrates, as conspicuously as any in history, that other aphorism of Sir W. Harcourt's, "Of all things at once the most illegal and the most unjustifiable is an unsuccessful intervention."

Alleged secret treaty between Russia and China.

But Russia did not rest content with the advantage she had gained over Japan in 1895. Ever active and vigilant, her diplomacy reaped important fruits in the course of the following year. The rumours of a Russo-Chinese treaty were revived in March, 1896, and in December what claimed to be the text of the treaty was published. In St. Petersburg nothing was known of it. In fact there is little doubt that a secret treaty arrangement had been concluded between Russia and China. The text of this agreement or treaty as published was, it is alleged, only that of the draft proposed by Count Cassini, Russian Minister at Pekin, for the approval of the Chinese Government, and was materially modified before definitive adoption. By this so-called treaty China allowed Russia to extend the Siberian railway across Manchuria, from Vladivostock to Hunch-un, and thence to the capital of the Kirin province, also from a city in Siberia to Aigun, to the provincial capital of Tsitshur, to Petunê in the province of Kirin and thence to the capital of Kirin. The entire control of the railways was to be in Russia's hands for thirty-six years, at the end of which time China was at liberty to redeem them. Russia was to be allowed to build another railway from Mukden to the Siberian trunk line if China failed to build it. She was further empowered to place soldiers at

important stations to protect railway property. China was permitted to engage Russian officers to reform her army organization. An additional clause provided Russia with a seaport. China further undertook to lease to Russia the port of Kioo-chau, in the province of Shantung. These rumours were substantially confirmed shortly afterwards by the issue of an imperial ordinance giving the Czar's sanction to the articles of association of the Eastern Chinese Railway Company, which undertook to construct a railway on Chinese territory in connection with the Russian Trans-Siberian Railway. The company was to have a capital of five million roubles, and the line was to be completed in six years. Even at that date, in 1896, the *National Zeitung* argued that the treaty could only be the fragment of a wider agreement procuring for Russia the ultimate possession of Port Arthur. But in this country later events showed that there was a complete indisposition to realize the sedulousness with which Russia was toiling towards her objective. Her action in Korea, as will be seen, only formed a part of the same consistent plan. It now remains to describe the final steps by which she acquired possession of Port Arthur. Early in 1898 her diplomacy was extraordinarily aggressive. Sir Nicholas O'Connor, our ambassador at St. Petersburg, informed Lord Salisbury, in a dispatch of January 19, that the endeavour of Great Britain to make Talienwan a treaty port, was regarded as so unfriendly an act in Russia as to set afloat rumours of war. On January 27 the Russian ambassador communicated to her Majesty's Government the assurance that any port acquired by Russia on the coasts of the North Pacific would be open to the ships and commerce of all the world, like any other port of the Chinese littoral. By the treaty of Tientsin, Art. 52, foreign countries were authorized to send ships of war to all ports within the dominions of China. About March 10, 1898, the British squadron sailed to the Gulf of Pe-chi-li and visited Port Arthur. The Russian Government protested, and Lord Salisbury, instead of reinforcing the squadron, instructed the British admiral, in more or less direct terms, to quit the port

Russian acquisition of Port Arthur.

without delay. This complaisance elicited censure from two such opposed leaders of public opinion in the House of Commons as Sir W. Harcourt and Lord Charles Beresford. The former observed that if we wished to come to an understanding with Russia, the worst thing we could do was to remove the ships, or to allow them to be removed. Nor was Lord Charles Beresford less emphatic in his censure of the withdrawal. On March 16 Count Muravieff authorized Sir Nicholas O'Connor to notify her Majesty's Government that in the event of the Chinese Government consenting to lease Talienwan and Port Arthur to the Russian Government, both ports would be open to foreign trade like other ports in China —a concession *lucus a non lucendo.* About this date Sir Claude Macdonald informed Lord Salisbury that the reason why Russia insisted upon a lease of the Liao-tung peninsula from China was that she desired the means of protecting Manchuria from foreign Powers. The Russian *chargé d'affaires* at Pekin declined to say what Powers were intended by this; but it was no secret, as Sir Nicholas O'Connor informed Lord Salisbury, that England and Japan were aimed at. He added that even the Chinese Government recognized the absurdity of the pretext. But the Yamên were aware that they must yield to Russia unless they received help, and therefore earnestly begged that Lord Salisbury would assist them by giving an assurance to the Russian Government that the British Government entertained no designs on Manchuria. The assurance requested by the Yamên was given. It was a fruitless, if a graceful, concession, and had so little effect in abating Russia's insistence, that on March 24 Sir Claude Macdonald telegraphed from Pekin that China was forced to give way to Russia against her will, the latter Power having threatened to take hostile measures unless a lease of both ports were granted before March 27.

In fact the English Government showed neither presence of mind nor resolution. On March 29 it was admitted that a treaty had been signed on March 27 between Russia and China, by which the usufruct of Port Arthur and Talienwan was granted to Russia. During the whole of the crisis, January–March,

1898, the *Times* supplied information of great precision and timeliness to the public; and ministers who consistently denied it were uniformly compelled, after a short interval, to accept it in substance.

Great Britain acquires Wei-hai-Wei.

It cannot, however, be said that Lord Salisbury failed to realize the seriousness of the position created by the aggrandisement of Russia when the treaty became known. The Prime Minister telegraphed to Sir Claude Macdonald that the balance of power in the Gulf of Pe-chi-li was materially altered by the surrender of Port Arthur by the Yamên to Russia, and that the British fleet was on its way from Hong-Kong to the Gulf of Pe-chi-li. In answer to Russia's action a lease of Wei-hai-Wei was extorted from China on April 4. Opinions, however, differed as to the value of the concession made by China to this country. The terms of the agreement with the Chinese Government effected by Russia on March 27, 1898, were that Russia was to have possession of Port Arthur and Talienwan (with territories that were neither defined at the time nor subsequently), and their adjacent waters for a term of twenty-five years, which might be extended by agreement. Within the territories and waters leased Russia obtained sole military and naval control, and was at liberty to build forts and barracks as she desired. Port Arthur was closed to all vessels except Russian and Chinese men-of-war [1]; part of Talienwan harbour was reserved exclusively for Russian and Chinese men-of-war, but the remainder was freely open to merchant vessels of all countries.

Terms of Russian tenure of Port Arthur.

Further Chinese concessions.

To the north a neutral zone was to be defined where Chinese troops should not be quartered except with the consent of Russia. For such period as Russia might hold Port Arthur, Great Britain was, by agreement with China, to hold Wei-hai-Wei, in the province of Shantung, and this port was occupied by British troops in June, 1898. For defensive purposes Great Britain, in addition, obtained a ninety-nine years' lease of territory on the mainland opposite the island of Hong-Kong. To compensate for the advantage given to the Russians,

[1] The stipulation that Port Arthur shall be closed to all but Russian and Chinese men-of-war seems contrary to the Treaty of Tientsin, Art. 52.

British, and Germans (who acquired Kiao-Chau, December–January, 1897–8), the Chinese Government granted to the French in April, 1898, a lease of the Bay of Kwang Chau Wan, on the east coast of the Tien-Chau peninsula, opposite Fort Hainan.

Applicability of term "usufruct."

These anomalous and unforeseen grants by China were needlessly complicated by the introduction of terms derived from Roman law. Whatever the precise nature of the territorial rights with which China parted in 1898, they were clearly rights derived from treaty. But the treaty part of the law of nations is precisely that part which is generally considered not to be derived from the Roman law. Consequently, the concessions of China in 1898 are hardly elucidated by being described as usufructs. Professor T. E. Holland observed on this point, "I can recall no other use of the term usufruct in international discussion than the somewhat rhetorical statement that an invader should consider himself as an usufructuary of the resources of the country which he is invading; which is no more than to say that he should use it *en bon père de famille*."[1] The reference is to Grotius, "De Jure Belli et Pacis," Bk. III. c. xii. s. 20. As Russia wrested Port Arthur from China under threat of war, there seems an ironical consistency in calling her tenure of it a usufruct by an appeal to the principles of Grotius. This consistency is only surface deep, for Grotius in so many words condemns such a proceeding as the grant of the leases by China in 1898. He not only declares that it is a void act for a king to sell his kingdom or yield it to another, but actually compares it to the act of a usufructuary who attempts to alienate his interest.[2] The problem really resolves itself into a dilemma as far as the principles of Grotius are concerned. There was no conquest in fact by Russia, therefore the lease of Port Arthur is not an instance of usufruct. Whether there was a war or not, it is a void act, Grotius says, for a king to sell his kingdom.

Professor T. E. Holland.

Use by Grotius of term "usufruct."

Russia's promise to evacuate Manchuria.

The Boxer rising of 1900 afforded an opportunity for Russia to pour troops into Manchuria. In September, 1903, she undertook to restore Niu-Chang and evacuate Mukden on

[1] *Times*, April 1, 1898. [2] Ibid. *supra* Bk. I. c. iv. s. 10.

October 8. Her failure to fulfil these two promises was the proximate cause of the war. On December 28, 1903, in spite of the promises referred to, the Russian Minister at Pekin informed the Chinese Foreign Office that no further steps could be taken towards the evacuation of Manchuria.

Suzerainty of China over Korea previous to 1895.

Before the Treaty of Shimonoseki, Korea was undoubtedly under the suzerainty of China, though in 1875 the Japanese obtained certain concessions which were of a commercial and not a political character. Since 1636 Korea has not been at war with either Japan or China, and has maintained an attitude of absolute isolation. Japan denied the suzerainty of China over Korea, and this issue was one of the ostensible causes of the Chino-Japanese War of 1894. The independence and integrity of Korea as a fully independent empire have been recognized by all the Powers since that event. This independence was acknowledged not only by the first article of the Shimonoseki Treaty of 1895, but also by an agreement specially concluded for this purpose between Japan and Great Britain on January 30, 1902, as well as by a Russian declaration of March, 1902.[1] The history of Korea since the Treaty of Shimonoseki resembles that of the Balkan States since the Treaty of Berlin. There have been repeated revolutions and disturbances, though the King, who in 1897 proclaimed himself Emperor, has remained on the throne. Immediately after the war between China and Japan, Russian aggrandizement began in Korea. Early in 1896, at a season of complete tranquillity, a force of Russian marines with a field gun landed at Chemulpho. The King, by a preconcerted arrangement, proclaimed his ministers guilty of treason, and fled to the Russian Legation. He remained there on the pretext that he feared the Japanese. Russia placed him under protection, and lent seven million roubles to develop the resources of Korea. In return for this she was to hold the two northern provinces of Korea as a guarantee for the debt. Japan was admitted (according to the statement in the Annual Register) to a share

Treaties recognizing independence of Korea since 1895.

[1] Cf. the answer of Earl Percy to Mr. Norman in the House of Commons, June 15, 1904.

in this arrangement. A kind of dual control or joint protectorate was established, under the terms of which both Russia and Japan were to keep 250 soldiers at Seoul. But Japan's share in the control was little more than nominal. From 1896–8 a Russian colonel acted as instructor to the military forces of Korea, who were armed with Berdan rifles. On the other hand, after the Boxer rising, Japan succeeded in defeating a Russian design to acquire Masampho, the finest harbour in Korea. The cruel execution of two Korean officials, formerly Cabinet Ministers, aroused great resentment in Japan in 1900, and from that year until 1905 the war cloud gradually deepened.

Summary of events before the war.

In June, 1903, General Kuropatkin, then Russian Minister of War, visited Tokio. His reception, and the friendly tone of the Russian Press at the time, gave some promise of a satisfactory settlement of the Russo-Japanese question in Manchuria. But Russia's continued occupation of Yongampho in Korea undeceived those who held this hope, and excited intense irritation in Japan. At a conference held in October, 1903, between the Japanese Ministers and the Elder Statesmen (Genro), Marquis Ito was said to have proposed that Japan should limit her demands to a pledge from Russia to respect and maintain Chinese and Korean integrity and independence. He further proposed to recognize Japan's "special interests" in Korea, and Russia's in Manchuria, with "equality of opportunity" for the commerce of both in Manchuria and Korea.

At this date it was generally recognized that six Japanese statesmen of the first rank were working for peace—Counts Okuma, Itagaki, Inouye, and Matsukata, and the Marquises Ito and Yamagata. The Emperor at the Japanese Diet (December 10, 1903) delivered a speech in which he referred to the prudence and circumspection shown by his Ministers in the negotiations for securing Japan's rights and interests.

A dramatic *dénoûment* to this pacific declaration occurred when the House of Representatives on the same day adopted, without a division, a reply imputing to the Ministry a temporizing policy at home and neglect of its interests

abroad. The House then dissolved. The Russian reply to Japan's demands was shortly afterwards received, but was considered unsatisfactory. After consultation between the Ministry and the Elder Statesmen (Genro) Russia was asked, on December 21, to reconsider her position. Rumours of her designs on Masampho were repeated about this date, and fomented the rising resentment in Japan. Finally, the Emperor of Korea, foreseeing the danger of a possible conflict between Russia and Japan, addressed, in the early part of January, 1904, a Note to all the Powers, declaring his determination to preserve the strictest neutrality. In fact, however, this declaration was favourable to Russia, and it was referred to in terms of praise by Count Lamsdorff in his protest against the commencement of hostilities by the Japanese.[1] The declaration of the Emperor of Korea has been subsequently described as a declaration of neutrality, although made at least a month before the outbreak of hostilities. According to the common view, a declaration of neutrality can only be made after two other Powers have declared war or engaged in hostilities. Against this may be set the view of some European publicists, such as Galiani and Azuni, that a state of neutrality is a continuation of a former state, and not the creation of a new state of things. If the state of neutrality is regarded as a continuation of a former state of things, there is nothing in principle to prevent the issue of a declaration of neutrality before the commencement of hostilities. It is proposed to review, in the succeeding chapter, the declaration of war by Japan, which followed shortly after the events which have been described. The sequence of events in Korea after the battle of Chemulpho, February 8, 1904, is so confused and chaotic that it is extremely difficult to reconcile it with any ordinary construction of the principles of either belligerency or neutrality.

At the commencement of 1904 it seems, however, fairly clear that Russia stood *de facto* at a certain advantage in Korea. The chief political figure in the country, Yi Yong Ik, who possessed practically dictatorial powers, was very friendly

[1] *Times*, February 24, 1904.

Japanese action in Korea, Feb., 1904.

to her pretensions. Further, at this date she had obtained a large number of valuable concessions from the Korean Government. On the evening of the battle of Chemulpho, the Japanese Minister had an audience of the Emperor of Korea, and declared that Japan would henceforward govern Korea, threatening that Japanese troops would occupy the Emperor's palace in case of resistance. The Japanese Legation in Korea made no previous declaration either to the Korea Government or the foreign representatives of the rupture of diplomatic relations with Russia or of the opening of hostilities.[1] The Russian Minister to Korea was dismissed, Yi Yong Ik was stripped of his office and banished to Japan, and changes were effected in the Korean Cabinet which brought into power the partisans of Japan. Four battalions of Japanese infantry were landed. A protocol between the Imperial Governments of Japan and Korea was concluded at or about the same date, February 8.[2]

On the conclusion of this agreement the position of Korea

[1] *Times*, February 23, 1904.

[2] M. Gonsuké Hayashi, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan, and Major-General Yi Chi Yong, Minister of State for Foreign Affairs *ad interim* of His Majesty the Emperor of Korea, being respectively duly empowered for the purpose, have agreed upon the following articles:—

Article I.—For the purpose of maintaining a permanent and solid friendship between Japan and Korea, and firmly establishing peace in the Far East, the Imperial Government of Korea shall place full confidence in the Imperial Government of Japan, and adopt the advice of the latter in regard to improvement in administration.

Article II.—The Imperial Government of Japan shall, in a spirit of firm friendship, ensure the safety and repose of the Imperial Household of Korea.

Article III.—The Imperial Government of Japan definitely guarantees the independence and territorial integrity of the Korean Empire.

Article IV.—In case the welfare of the Imperial House of Korea or the territorial integrity of Korea is endangered by aggressions of a third Power or internal disturbances, the Imperial Government of Japan shall immediately take such necessary measures as circumstances require, and in such case the Imperial Government of Korea shall give full facility to promote the action of the Imperial Japanese Government. The Imperial Government of Japan may, for the attainment of the above-mentioned object, occupy, when the circumstances require it, such places as may be necessary from strategic points of view.

Article V.—The Governments of the two countries shall not in future, without mutual consent, conclude with a third Power such an arrangement as may be contrary to the principles of the present protocol.

Article VI.—Details in connection with the present protocol shall always be arranged as the circumstances may require between the representative of Japan

became very anomalous. According to the view of international law taken by Dr. Lushington in the case of the Ionian ships (2 Spinks, 212), a protecting State has the right to make peace or war for the protected State, but must clearly express an intention to place the protected State in a state of war. *Ex necessitate rei*, the protected State does not become a belligerent from the sovereign State being at war. Before the outbreak of the South African War, Mr. Schreiner, then Prime Minister of Cape Colony, announced that if hostilities ensued between Great Britain and the South African Republic Cape Colony would remain neutral. This declaration incurred strong animadversion at the time,[1] and is quite incapable of defence by reference to the rule laid down by Dr. Lushington, inasmuch as Cape Colony is not a protectorate, but a self-governing dependency of Great Britain. Korea, whether belligerent or neutral.

It will be seen from the below given conventions between Korea and Japan, that Korea has become, at least for the moment, a protected State. Japan seems, by virtue of these conventions, to stand in the same relation substantially to Korea that Great Britain occupies with respect to Egypt. The analogy is rather one of substance than of form, because

and the Minister of State for Foreign Affairs of Korea. (Cf. *Times*, February 29, 1904.)

An arrangement similar to that alluded to in Article VI. of the above protocol of February, 1904, was signed at Seoul on August 22 between the representatives of Japan and Korea. The fact that so long an interval occurred before effect was given to Article I. of the protocol of February, must be attributed to the difficulty Japan encountered in overcoming Russian influence in the Korean Cabinet, as throughout August there are found in the columns of the *Times* allusion to the fact that the Japanese Minister at Korea was urging on the Emperor to dismiss his Cabinet and replace them by advisers well disposed to Japan. The text of the agreement of August 22 was as follows:—

(1) The Korean Government shall engage as financial adviser to Korean Government a Japanese subject recommended by the Japanese Government, and all matters concerning finance shall be dealt with after his counsel has been taken.

(2) The Korean Government shall engage as a diplomatic adviser to the Department of Foreign Affairs a foreigner recommended by the Japanese Government, and all important matters concerning foreign relations shall be dealt with after his counsel has been taken.

(3) The Korean Government shall consult the Japanese Government before concluding treaties or conventions with foreign Powers and in dealing with other imperial diplomatic affairs, such as the granting of concessions to or contracts with foreigners.

[1] *Law Times*, Sept. 9, 1899.

we do not nominally exercise suzerainty over Egypt, whose suzerain Power is, on the other hand, Turkey, a third Power. It seems very difficult either to understand or to defend the conventions concluded by Japan with Korea in this year, except upon the ground of military exigency, going to the root of national existence. A State fighting for its independence — and nothing less than the independence of Japan is at stake in the Russo-Japanese War — may cite authority as high as Vattel to justify acts not otherwise permissible. The attitude of the Korean Government at this time was not friendly to Japan. But the protocols under discussion seem not only to infringe the Treaty of Shimonoseki, but also the Anglo-Japanese alliance created under treaty nearly two years before. While the provision of the protocol of February, 1904, relating to the occupation of strategic points in Korea by Japanese troops, under certain contingencies, may perhaps not be considered to infringe the territorial integrity of Korea, it cannot be said that the convention does not affect its status as an independent Power. It is quite true that by Art. 3 Japan guarantees the independence of Korea; and the limitation on the treaty-making Power is mutual to both States, and only operates as regards engagements contrary to the tenor of the protocol. The later convention, after providing for the appointment of financial and political advisers, limits the treaty-making power of Korea by a general restraint. Therefore, Korea appears to be in the same position as the South African Republic under the London Convention. The mere appointment of advisers does not of itself involve a protectorate, and it can hardly be supposed that the Japanese Government intended permanently to reduce Korea to the position of a mi-Souverain State by the protocols of February, 1904, and August 22. But it is difficult to exclude the generally prevalent impression that by this arrangement Korea has virtually become mi-Souverain. If this view is accepted, the protocol of February, 1904, constitutes an undoubted infraction both of the Treaty of Shimonoseki, 1895, and of the Anglo-Japanese convention. Further, it is calculated to imperil the relations of Japan

with France, since the latter Power, by the Franco-Russian agreement that ensued on the Anglo-Japanese agreement, equally guaranteed the independence of Korea. The Anglo-Japanese alliance, and the answering Franco-Russian declaration, though only temporary engagements, do not expire till 1907.

Count Lamsdorff, after the agreement between Japan and Korea, in a protest addressed to the Powers, declared that Russia did not consider herself to be at war with Korea. At that date, and even long after February, 1904, Korea had a representative at St. Petersburg. Therefore, if Korea declared war by entering into the agreement with Japan, the only historical parallel for her action in commencing belligerent operations without withdrawing her ambassador is that afforded by Russia herself, who, in 1808, invaded Finland before the ambassadors had been withdrawn on either side.

It is, of course, quite impossible to deny that Korea is *de facto* belligerent at the present time, her troops having actually engaged in belligerent operations with bodies of Russian troops.

The terms of the Anglo-Japanese agreement of February, 1902, to which great attention has naturally been devoted during the course of hostilities, are as follow. The two Governments, "actuated solely by a desire to maintain the *status quo* and general peace in the Far East, and being specially interested in maintaining the independence and territorial integrity of the empires of China and Korea, and in securing equal opportunities in these countries for the commerce and industry of all nations," agreed as follows :—

Terms of Anglo-Japanese Agreement, Feb. 12, 1902.

"I. The High Contracting Parties, having mutually recognized the independence of China and Corea, declare themselves to be entirely uninfluenced by any aggressive tendencies in either country. Having in view, however, their special interests, of which those of Great Britain relate principally to China, while Japan, in addition to the interests which she possesses in China, is interested in a peculiar degree politically, as well as commercially and industrially, in Corea, the High Contracting Parties recognize that it will be

advantageous for either of them to take such measures as may be indispensable in order to safeguard those interests if threatened either by the aggressive action of any other Power, or by disturbances arising in China or Corea, and necessitating the intervention of either of the High Contracting Parties for the protection of the lives and properties of its subjects.

"II. If either Great Britain or Japan, in defence of their respective interests, as above described, should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally.

"III. If in the above event any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance, and will conduct the war in common, and make peace in mutual agreement with it.

"IV. The High Contracting Powers agree that neither of them will, without consulting the other, enter into separate arrangements with another Power to the prejudice of the interests above described.

"V. Whenever, in the opinion of either Great Britain or Japan, the above interests are in jeopardy, the two Governments will communicate with one another fully and frankly."

VI. This article provides that the agreement shall come into effect at once, and remain in force five years, and if not denounced at the end of the fourth year, till a year after being denounced by either party. "But if, when the date fixed for its expiration arrives, either ally is actually engaged in war, the alliance shall *ipso facto* continue until peace is concluded."

Explanation of Anglo-Japanese Agreement by Lord Lansdowne.

It is by no means uninstructive to recall some ministerial interpretations of the Anglo-Japanese convention. Lord Lansdowne observed that Japan could well hold her own in combat with a single Power, but that if she were attacked by more than one she would be in imminent peril; and against a coalition of Powers we meant to protect her. The territorial integrity of China included Manchuria. The failure of Russia to keep her repeated promises to evacuate Manchuria has, therefore, on this view, brought

about one of the conditions which demands the intervention of this country under the convention. Further, since the convention expressly lays it down that Great Britain is interested, even more than Japan, in maintaining the territorial integrity of China, it should logically seem that it was this country, and not Japan, on which the obligation was incumbent of insisting upon the evacuation of Manchuria by Russia according to the express terms of the convention.

By Lord Cranborne.

Lord Cranborne, shortly after the conclusion of the Anglo-Japanese convention, observed that it was not framed in an aggressive spirit. The principle of the open door and of the territorial integrity of China had been laid down in several public documents, and was accepted by almost all the Powers. These two principles, and the recognition of Japan's special interests in Korea, which were admitted by Russia in 1898, were the three main foundations of the agreement. It was only when either party to the alliance was the subject of aggression from two Powers in combination that the obligation on the other to fight would come into effect. Whether or not such aggression had been suffered would be a question for the ally so called upon.[1]

Franco-Russian declaration, March, 1902.

The Anglo-Japanese agreement elicited an official declaration from Russia and France welcoming the principles affirmed by the treaty, but reserving to themselves the consideration of the means of protecting their interests in certain eventualities. This declaration was regarded in Russia as specially important, because it showed that the Franco-Russian alliance bound the two Powers to act in the Far East as well as in Europe. It is impossible not to comment on the fact that while the Franco-Russian declaration of March, 1902, professed "to welcome" the principles of the territorial integrity and independence of China and Korea, Russia was at the time occupying Manchuria, and more than a year afterwards found herself unable to assign a date for evacuation. The most interesting feature of the Franco-Russian declaration of March, 1902, is that it suggested an obligation on France, in certain ill-defined contingencies, to act jointly with

[1] "Annual Register," February, 1902, p. 60.

Russia in the Far East. However, this is all that can be said. To the extent to which the Franco-Russian declaration has been made public, it does not appear that France contemplated that Russia might be made the object of a coalition of Powers, such as that which, in 1895, prevented Japan from acquiring Port Arthur. But it is not easy to see what is the rationale of the Franco-Russian declaration, unless it is merely a counter declaration to the Anglo-Japanese alliance.

CHAPTER II.

RUSSIA AND THE PASSAGE OF THE BOSPHORUS—THE RAID OF THE VOLUNTEER CRUISERS, "PETERSBURG" AND "SMOLENSK," IN THE RED SEA.

History of the question.

THE right of innocent navigation in appropriated basins which is recognized to-day was not conceded by Turkey when the Black Sea was a Turkish lake. Peter the Great was able for a time to acquire a footing on the Black Sea, and set his heart on putting Russia in regard to the Dardanelles in the same position as she occupied in the Sound. But his successors were defeated in this object by the wars which took place in the beginning of the eighteenth century. The Black Sea only ceased to be a Turkish lake in consequence of the Treaty of Kutchuk-Kainardji in 1774. While restoring to Turkey much of the territory of which her arms had put her in possession, Russia retained Kinburn, Yenikale, Kertch, and Azoff, with the adjacent territory. By Article XI. of the Treaty of Kainardji, Russian merchant vessels were given a free passage through the Bosphorus, and the aim of Peter the Great's policy seemed realized.[1] But after the Treaty of Kainardji, Russia and Turkey treated the Black Sea as a mare clausum, which was closed to the commerce of all other countries. By the seventh article of the Treaty of Adrianople, 1829, the right of innocent navigation was conceded in the Black Sea, not only to Russian merchant vessels, but also to those of other European States in amity with Turkey.[2] At the Treaty of Adrianople, therefore, the situation, as far as the

Treaty of Kutchuk-Kainardji, 1774.

Treaty of Adrianople, 1829.

[1] Cf. Article on the Malacca Incident in the *Times* July 25, 1904.

[2] Martens, "Nouveau Recueil," t. viii. p. 143.

Black Sea and Dardanelles were concerned, was, in the view of modern international law, purely a normal one. They became territorial waters, in which the right of innocent navigation could be exercised, while access was prohibited to the public armed vessels of other States. For obvious reasons Turkey had always strenuously opposed the entry of foreign vessels of war into the Straits. From ancient times she refused such permission, and asserted her rights to exclude them. But when Mehemet Ali's revolt against the Sultan menaced the safety of the Ottoman Empire, Russia and Turkey concluded in 1833 the Treaty of Unkiar Skelessi, by which the former engaged to send its fleet and army to the aid of the latter, the fleet being free to pass the Bosphorus and Dardanelles. By a separate and secret article the Porte promised not to allow the entrance of the vessels of war of other nations under any pretext whatever. This arrangement was not long maintained in the face of the opposition of Europe; and England and France protested against the Secret Article as soon as it became known to them. By the treaty concluded at London on July 13, 1841, between the five great European Powers and the Ottoman Porte, the principle of closing the Straits was for the first time declared in a formal instrument. By the first article of this treaty the Sultan declared his firm resolution to maintain in future the principle invariably established as the ancient rule of his empire; that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said Straits. The five Powers, on their part, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle.

Treaty of Unkiar Skelessi, 1833.

Treaty of London, 1841.

By the second article it was provided that, in declaring the inviolability of this ancient rule of the Ottoman Empire, the Sultan reserved the faculty of granting, as heretofore, firmans allowing the passage to light armed vessels employed, according to usage, in the service of the diplomatic legations of friendly Powers.

By the third article the Sultan also reserved the faculty of notifying this treaty to all the Powers in amity with the Sublime Porte, and of inviting them to accede to it.

Article X. of the General Treaty of Peace, signed at Paris, March 30, 1856, referred to "the ancient rule of the Ottoman Empire" as to the closing of the Straits of the Bosphorus and of the Dardanelles. And by a convention annexed to this General Treaty, between her Majesty the Queen of England, the Emperor of Austria, the Emperor of the French, the King of Prussia, the Emperor of Russia, and the King of Sardinia on the one part, and the Sultan on the other part, respecting the Straits of the Dardanelles and of the Bosphorus, it was firmly resolved to "maintain for the future the principle invariably established as the ancient rule of his empire, and in virtue of which it has, at all times, been prohibited for the ships of war of foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus; and that, so long as the Porte is at peace, His Majesty will admit no foreign ships of war into the said Straits."

General Treaty of Peace, 1856.

Straits Convention.

"And their Majesties, the Queen of the United Kingdom of Great Britain and Ireland, the Emperor of Austria, the Emperor of the French, the King of Prussia, the Emperor of all the Russias, and the King of Sardinia, on the other part, engage to respect this determination of the Sultan, and to conform themselves to the principle above declared." By Article II. it was provided, "The Sultan reserves to himself, as in past times, the right to deliver firmans of passage for light vessels under flag of war, which shall be employed, as is usual, in the service of the Missions of Foreign Powers." By Article III. it was provided, "The same exception applies to the light vessels under flag of war, which each of the Contracting Powers is authorized to station at the mouth of the Danube, in order to secure the execution of the regulations relative to the liberty of that river, and the number of which is not to exceed two for each Power."

Next by treaty between Great Britain, Austria, and France, guaranteeing the independence and integrity of the Ottoman Empire, April 15, 1856, it was provided (Article II.), "Any infraction of the stipulations of the said treaty (*i.e.* the treaty of March 30, 1856) will be considered by the Powers signing the present treaty as a *casus belli*. They will

Treaty guaranteeing independence and integrity of Ottoman Empire, 1856.

come to an understanding with the Sublime Porte as to the measures which will have become necessary, and will without delay determine among themselves as to the employment of their military or naval forces."

London Convention, 1871.

Article II. of the London Convention of 1871 provided that "the principle of the closing of the Straits, such as it has been established, is maintained," but that power should be given to the Sultan "to open the Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris, 1856." By the London Convention of 1871 both Russia and Turkey acquired the power of building military or maritime arsenals on the coasts of the Black Sea, and became entitled to maintain a fleet on its waters, thus abrogating the neutralizing clauses of the Black Sea Convention, 1856.

Halleck on.

General Halleck suggests that the right of Turkey to exclude foreign ships of war from entering or passing either the Dardanelles or the Bosphorus "was considerably modified by the Treaty of London, 1871."[1] The discussion which Mr. W. E. Hall devotes to the subject confirms the common view that the Treaty of London, 1871, is to be explained on purely political considerations. From the point of view of international law, the action of Russia in tearing up the Black Sea Convention has never been seriously justified. Lord Granville, at the time, did not attempt to refute or even notice the grounds on which Russia sought to justify her action in 1871; and Mr. W. E. Hall considers that the only plausible pretext was the passage of the public vessels of other States. At the most, there was a nominal breach of the treaty by other Powers, as they merely dispatched isolated vessels, at long intervals, through the Dardanelles into the Black Sea. The fact that Russia succeeded in her object as far as the Black Sea Convention is concerned, no doubt gave rise to Halleck's opinion that the Treaty of London, 1871, has modified the Straits Convention, 1856. But Russian diplomacy absurdly exaggerated the facts, describing the

Hall on.

[1] Halleck's "International Law," vol. I, p. 170.

passage of eight vessels in fifteen years as the passage of "whole squadrons." As regards the last phase of the question, Wheaton opportunely reminds us, "The Treaty of Berlin contains no express mention of the Dardanelles, but in the Eighteenth Protocol, Lord Salisbury declared on behalf of England 'that the obligations of Her Britannic Majesty relating to the closing of the Straits do not go further than an engagement with the Sultan to respect in this matter His Majesty's independent determination in conformity with the spirit of existing treaties.'" The plenipotentiaries of Russia declared, in reply, that "without being able exactly to appreciate the meaning of 'Lord Salisbury's proposition,' in their opinion the principle of the closing of the Straits is an European principle," and that existing stipulations are binding on the part of all the Powers, "not only as regards the Sultan, but also as regards all the Powers signatory to these transactions."[1] The intention of the British declaration was, apparently, to reserve liberty to British ships of war to enter the Straits with the consent of the Porte."[2]

Treaty of Berlin, 1878; 18th protocol.

It is very necessary, in view of the despatch by Russia of her auxiliary cruisers through the Bosphorus in July, 1904, to remember that at the Treaty of Berlin, the last occasion on which the principle of the closing of the Straits received international consideration, the Russian plenipotentiaries declared that it was an "European principle," binding all the Powers signatory to the transactions of 1856 and 1871. There is nothing to show that the Russian plenipotentiaries at the Treaty of Berlin considered that the Treaty of London, 1871, had considerably, or in fact at all, modified the Straits Convention, 1856. It seems no less certain that the intention of the British declaration at the Treaty of Berlin was to reserve an even less restricted liberty for British ships of war to enter the Straits than that suggested by the learned editors of Wheaton's "International Law."

It must be remembered that in February, 1878, Admiral Hornby, with a fleet of ten ironclads, passed through the

[1] Holland, "European Concert," p. 226.
[2] Wheaton's "International Law," ed. 1904, p. 286.

Admiral Hornby's passage of the Dardanelles, Feb., 1878.

Dardanelles in the face of a formal protest by Turkey, and that he even desisted at first on account of the protest. Afterwards, on receiving further instructions, he effected the passage without a shot being fired. In the House of Lords the Earl of Derby justified this action on the ground that at the time Turkey could hardly be considered a free agent, and that therefore the British Government took responsibility on themselves.[1] At the time, the army of the Grand Duke Nicholas lay outside Constantinople, into which it had the power, in a military sense, of entry at will. The fact that the Porte forwarded its protest against the passage of the Dardanelles to the plenipotentiaries at the Russian headquarters, throws considerable light on the real position. The view taken by the British Government was that the Turkish protest against the passage of Admiral Hornby's squadron did not proceed from "the independent determination of the Sultan," and that therefore it could be disregarded. The British declaration at the Treaty of Berlin can only be construed in the light of preceding facts. So far from merely reserving liberty to British ships of war to enter the Straits with the consent of the Porte, it apparently reserved the more extended, though still conditional, right of entering with or without the consent of the Porte, when the consent, in the latter case, was withheld under circumstances which were beyond the control of the Porte. It is worth noticing that Austria, France, and Italy applied to the Porte for firmans for the passage of war vessels about the same time that Admiral Hornby passed the Dardanelles. In the House of Lords the Earl of Derby does not seem to have stated that the Porte had either granted or refused these firmans, but he evidently considered it improbable that the Powers in question would necessarily avail themselves, if they had received permission, of the firmans. A little earlier in the year Lord Beaconsfield stated that "the intention of sending the fleet in that direction was that it should defend the lives and properties of British subjects in Constantinople, and take care of British interests in the Straits."[2] On the whole it must be

[1] *Times*, February 15, 1878.

[2] Ibid., January 26, 1878.

conceded that the technical contention that Turkey at the time was not in a position to give consent, is somewhat deficient as a legal justification. But even if it be conceded that the passage of the Dardanelles by Admiral Hornby's squadron in the face of the formal protest of Turkey was a breach of treaty, there is much to be said for the view that the subsequent declaration of the Russian plenipotentiaries at the Treaty of Berlin constituted a waiver of the breach as far as Russia is concerned.

The closing of the Straits by treaty remains a principle of far-reaching importance, and the question became critical in view of the passage of the Bosphorus by the Russian volunteer cruisers in July, for this disregard (if such it be) of treaty obligations enabled Russia to call another fleet into existence.

Perhaps the restraint imposed on Russia is of a higher character than even a treaty stipulation, being based upon an ultimate postulate of international law, the territoriality of sovereignty. The precedent of 1870–1, when two powerful belligerents like France and Germany respected the neutrality of a weak State like Belgium, though military exigency and, in the case of France, even self-preservation might have been invoked to justify its infraction, shows that the most powerful belligerents have learned to respect the territory of a weak neutral.

It is hardly necessary to point out that the Ottoman Porte exercises territorial jurisdiction over the Dardanelles and Bosphorus, as those Straits are less than six miles wide in most parts, and Turkey enjoys sovereignty over the littorals on either side.[1]

[1] The following interesting account of the Dardanelles in 1745 is met in "A Collection of Voyages and Travels compiled from the Curious and Valuable Library of the Earl of Oxford"; "Some thirty-one miles below Gallipoli is the straightest passage of the Hellespont, a place formerly famous for Xerxes' bridge, but much more glorious in the loves of Hero and Leander. These castles, called the Dardanelles, command the passage, and are the security of Constantinople on that side: that upon Europe, anciently Sestos, is made with two towers, one within the other; the inmost highest, by means of the rising ground upon which they stand, each bearing the form of three semi-circles with the outward triangular: the other upon the Asian side is far stronger, standing on the mariseth level, it is of form square with four round turrets, at each corner one: in the middle before stands one high square tower commanding over all. This formerly was named Abydos, not that the thing remained the same, but often re-edificed in the same place." (Ibid., *supra*,

The closing of the Straits an inference from principle apart from treaty.

On this view "the ancient rule of the Ottoman Empire," declared by the treaties of 1841, 1856, and 1878, seems no more than an enunciation of that first principle of international law, the territoriality of sovereignty. Since the Porte exercises exclusive territorial jurisdiction over the Straits, it would appear that a passage of the Straits by the commissioned vessels of a belligerent State, when the Porte is at peace, would constitute an inruption into neutral territory comparable to that made by the army of General Clinchant into Switzerland in 1871, and the same consequences ought in strictness to follow, that is, the disarmament of such a belligerent force, and internment. Mr. W. E. Hall observes that it is somewhat more than doubtful whether any instances of a right of military passage have survived the simplification of the map of Central Europe effected by the formation of the German Empire, though he concedes that Germany has still a right of military passage over the Canton Schaffhausen, leading from the interior of Germany to the Rhine.[1] The use of this continued passage in time of war, Mr. W. E. Hall admits, might possibly become a subject of dispute. It is clear that a permission by Turkey for Russian ships to pass the Bosphorus and Dardanelles would be a concession of a similarly controversial character. The same writer instances the solid nature of the advantage Russia would gain if, being at war with France, she were allowed to march her troops across Germany.[2] But the advantage that Russia would gain by being allowed by the Porte to dispatch a fleet

vol. I. p. 521.) The following account is given of the Bosphorus and Dardanelles in Stanford's "Compendium of Geography, Europe," vol. i., "The Countries of the Mainland" (c. iii.), "The Balkan Peninsula" (p. 181): "The Bosphorus is a gap due to a primary convulsion of nature; subsequently enlarged by the erosive action of the sea currents. At its widest part it is three miles across, and its narrowest under half a mile. The Dardanelles or Hellespont is precisely similar to the Bosphorus in the manner of its origin as well as in its typical characteristics. It is, however, longer (forty miles) and wider (three-quarters to four miles and a half), and its shores are not so high. The Sea of Marmora is 110 miles long, forty-three wide. It seems clear that it possesses a better title to be called an appropriated sea than the Zuider Zee, the entrances to which, though narrow, are two miles and a half and six miles wide, and therefore wider than either those of the Dardanelles or Bosphorus, the western and eastern mouths of the Sea of Marmora. (Cf. Stanford's "Compendium of Geography," by Geo. Chisholm. "Europe," vol. ii.; "The North-West," pp. 35, 36, for reference to the Zuyder Zee.)

[1] Hall's "International Law," 5th ed., pp. 160, 601.

[2] Ibid., p. 605.

through the Bosphorus is an advantage of no less solid a character. The late Emperor Frederick once observed that "in war it is the moment which decides," and the time which Russia would gain by being allowed to dispatch a fleet through the Bosphorus instead of round from the Baltic might easily be decisive of a campaign. It is clear that no future possible enemy of Russia can contemplate with indifference a permission granted by the Porte to that Power to dispatch a fleet through the Bosphorus. There does not seem any difference in principle between such a concession and the right of military passage over alien territory of which, as has been seen, it may almost be said there is no modern instance surviving. Nor is there room for controversy as to the rule that "straits which are less than six miles wide are wholly within the territory of the State or States to which their shores belong."[1] Thus the whole of the oyster beds in the Bay of Cancalé, the entrance of which is seventeen miles wide, were regarded as French. Some writers still contend that the Queen's Chambers belong to England, and a recent decision of the Privy Council has affirmed English jurisdiction over the Bay of Conception in Newfoundland, which penetrates forty miles inland, and is fifteen in mean breadth. The Bay of Conception has clearly less right to be regarded as an appropriated water than the Sea of Marmora, the entrances to which, at either end, narrow to less than a mile. Authors so little favourable to maritime property as Ortolan and De Cussy, class the Zuyder Zee among appropriated waters. Yet the Zuyder Zee is in no sense a landlocked sea like the Sea of Marmora. It is capable of being entered through more than two channels by vessels of light draught, and both the Marsdiep and the Vliestrom, the channels connecting the Zuyder Zee with the North Sea, are wider than the Bosphorus and Dardanelles at their narrowest channels. The United States, Mr. W. E. Hall observes, probably regard as territorial the Chesapeake and Delaware Bays, and other inlets of the same kind. As there is no question of interfering with the right of

Appropriated waters, instances of.

[1] Hall's "International Law," 5th ed., p. 155.

innocent navigation, it is difficult in principle to separate gulfs and straits from one another. It may be remembered that from the fifteenth century all ships using the Sound between Zealand and Sweden, leading from the Cattegat into the Baltic, except such as belonged to the Hanseatic towns, and one or two others in the Baltic, were charged toll for passing through. These Sound duties were abolished on March 14, 1857, by a treaty between Denmark and the principal maritime Powers. A pecuniary compensation of £3,386,260, of which Great Britain paid £1,125,206, was given to Denmark, which bound itself to maintain the light-houses and superintend the pilotage of the Sound. The Sound, at its narrowest part, between Elsinore and Helsingborg, is only three miles wide. The Great Belt is fifteen miles wide, and the Little Belt seven miles, though it narrows to one mile and three-quarters.[1]

The Great Belt, being fifteen miles wide, could not possibly be claimed as territorial water. The claim of Denmark to levy Sound dues, since the difficulties of navigation forced ships to resort to that passage rather than the Belts, seems quite indefensible. If such dues were properly leviable at all they ought to have been divided with Sweden, whereas they were exclusively claimed by Denmark.

But it is curious to note that, at this day, under the San Juan Award of Emperor William I. of Germany, sovereignty is assumed over a channel wider than even the Great Belt.

Both Great Britain and the United States continue to claim as territorial the waters of the Straits of Fuca, separating Vancouver's Island from the mainland. Under the protocol signed at Washington in 1873, for the purpose of marking out the frontier in accordance with the Emperor's arbitral decision, the boundary, after passing the island of San Juan, is carried across a space of water thirty-five miles long by twenty broad, and is then continued for fifty miles down the middle of a strait fifteen miles broad until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatooch Island lighthouse on the American shore,

[1] Stanford's "Compendium Geography, Europe," vol. ii. p. 700.

the waterway being there ten miles and a half in width.[1] If this arbitral decision embodies the true doctrine of appropriated waters in international law, then a portion of the Sea of Marmora falls well within that category. It is somewhat surprising that Mr. W. E. Hall, while he clearly seems to view with approval the claim to a right of property in basins of considerable area if approached by narrow entrances, such as those of the Zuyder Zee, does not review the claims of the Sea of Marmora to be regarded as an appropriated basin of Turkey. He merely notices that the Treaty of Paris contained a promise on the part of Turkey to close the Bosphorus to foreign vessels of war. On the other hand, Mr. Hall evidently considers the claim of Holland to regard the Zuyder Zee as an appropriate basin to be eminently reasonable. It exists independently of treaty, and proceeds upon well-established principles which can be urged with even greater force in the case of the Sea of Marmora. The marked tendency recently observed by Professor T. E. Holland, of extending the limit of marginal seas, in view of the increased range of modern cannon, tends to put the inviolability of the Bosphorus and Dardanelles on an even higher footing, if that were necessary, than it stands at present.[2]

But assuming the Sea of Marmora to be a territorial water, the treaties closing the Straits have not created any exception, but are merely to be regarded as declaratory of the common laws of nations.[3] It becomes, on this view, very difficult to concur with the position of M. de Martens, that the closure of the Dardanelles to vessels of war "became a principle of public European law" by the Straits Convention of 1856. It seems, on the other hand, to have pre-existed as an essential inference from a postulate, not of European public law, but of international law itself. In any case, the closing of the Straits was affirmed as a principle of

[1] Hall's "International Law," 5th ed., pp. 157-8, referring to Parliamentary Papers, North America, No. 10, 1873.

[2] *Times*, May 25, 1904.

[3] Vattel observes that if a sea has no other communication with the ocean than by a channel of which a nation may take possession, it is the property of that nation ("Droit des Gens," l. i. c. xxiii. s. 294).

public European law by treaty before 1856. The first article of the Straits Convention of 1856, as has been seen, is merely a literal transcript of the first article of the Treaty of London, 1841.

The *Smolensk* and *Petersburg* incidents, July, 1904.

It is now proposed to consider the circumstances of the passage of the Bosphorus and Dardanelles by the Russian volunteer cruisers, *Smolensk* and *Petersburg*, in July, 1904. This incident raised two separate and independent issues: (1) Whether the dispatch of these vessels did not involve a breach of the Straits Convention, 1856, and the succeeding treaties closing the Straits. (2) Whether the act of commissioning such vessels did not constitute an infraction of the first Article of the declaration concerning maritime law signed at Paris, 1856, to which Russia was a signatory, "La course est et demeure abolie." For an adequate appreciation of these two points it is convenient to summarize the facts, as related in the *Times*, July–September, 1904.

The *Smolensk* and *Petersburg*, two auxiliary cruisers carrying quick-firers, and capable of steaming eighteen to twenty knots, appear to have commenced a voyage with stores to the Far East, which proved abortive, the early naval successes gained by Japan causing them to return. Apparently during April and May there were persistent rumours that the Black Sea Volunteer Fleet were preparing for cruiser service. It was finally announced in the *Times*, July 6, that the Russian Volunteer Fleet steamers *Petersburg* and *Sevastopol* passed through the Bosphorus from the Black Sea. Their destination was then unknown. The *Sevastopol* was flying the Red Cross flag below the commercial flag, and her hull was painted white, and she was therefore presumed to be intended for a hospital ship. The *Petersburg*, which was only flying the commercial flag, was stopped by the firing of blank cartridge at the end of the Bosphorus, no previous warning of her arrival having been given. After a delay of several hours she was allowed to proceed. The next day the *Smolensk* passed through. On July 8 the *Petersburg* was reported at Port Said, having a crew of 240 men. Her destination was stated to be Vladivostock, and her mission that of a collier. Even

the departure of the *Alabama* from the Mersey in 1862 was hardly attended by such a clandestine character as the passage of the *Smolensk* and *Petersburg* through the Bosphorus. All three vessels assumed entirely a false character, and it is of course immaterial that the assumed character was different in each case. The essential deceit lies in the assumption of a false status, and not in the use of a flag by a war vessel. In war it is a legitimate ruse to hoist the flag of another nationality than that to which the vessel belongs, provided that the true flag is hoisted before commencement of action. But the use of the commercial flag by the *Smolensk* and *Petersburg* was not a legitimate ruse like the use of a foreign flag by a belligerent war vessel. The *Alabama* when cruising in the China Seas flew the French flag, but invariably disclosed her status before going into action.

It was, however, stated in the *Times* that the change of flags in the case of vessels belonging to the Volunteer Fleet was usual since 1884, under an arrangement between the Russian and Turkish Governments known to the Powers. But, by the Russo-Turkish Agreement of 1891, it was stipulated that volunteer cruisers should not carry arms or munitions of war, a stipulation which was directly infringed by the passage of the *Smolensk* and *Petersburg*.

The *Malacca* incident directed public attention in England to the status of the cruisers. This vessel was an intermediate steamer, belonging to the Peninsula and Oriental Company, carrying passengers and cargo from London to China and Japan. She carried lyddite in boxes marked with a broad arrow for the British arsenal at Hong-Kong, and left London on June 25 for the Far East, under the command of Captain Street. She sailed from Suez on July 9 for Singapore, where she was timed to arrive July 28. On July 13, however, she was seized by the Russian volunteer cruiser *Petersburg* off Munshejera Island, South Red Sea. The Russians placed a prize crew of some sixty men on board her, and on arrival at Suez, Captain Street, her commander, was forbidden to communicate with the British consul. She reached Port Said on July 21. Her passengers and crew were disembarked, and on

the 25th Captain Street arrived in London. On the 28th the vessel arrived at Algiers, flying the Russian flag, with a prize crew under Captain Schwartz, who apparently stated that the *Malacca* was bound for Libau. On arrival at Algiers the Russian consul had an interview with the British consul on board the *Malacca*, after which the cargo was subjected to a detailed examination. There was, of course, no justification for such an abuse of a neutral port.

The Russian flag, after an interview between the two consuls, was hauled down at sunset, July 28, and on August 6 the *Malacca* left Algiers for Port Said, in resumption of her original voyage.

At the time of the seizure Parliament was in session, and questions were addressed to Earl Percy, the Under Secretary of State for Foreign Affairs (July 19) and the Prime Minister (July 22). The details were not fully known in this country when General Laurie addressed his question on the subject to Earl Percy, though the *Times* of that date contained a leading article on the seizure of the *Malacca*. But on July 20—practically within twenty-four hours after the matter became known—Sir Charles Hardinge, on behalf of the British Government, addressed to the Russian Government a protest, calling attention to the irregular position of the *Petersburg*, and to the fact that the ammunition seized on board the *Malacca* was the property of His Majesty's Government, was intended for the British-China squadron, and was contained in cases which were clearly marked with the broad arrow. It was added that a very serious situation was involved.[1] On the same day, it was announced that the Russian Government had given orders for the immediate release of the *Malacca*, and subsequently that they undertook that similar incidents should not occur in the future. The cargo of the *Malacca* was to be examined, and a claim for damages entertained.

This incident raised several questions of international law. It is not proposed to discuss here the undoubtedly improper exercise of the belligerent right of visitation and search, the subject admitting of more convenient treatment in a subsequent

[1] *Times*, July 21, 1904.

chapter. The immediately material issue in the *Malacca* case is the status of the Russian volunteer cruisers which passed the Bosphorus.

In a letter addressed by Professor T. E. Holland to the *Times* on the subject, it was pointed out that the facts specially calling for attention in the case of the *Malacca* were: (1) that the capture was effected by a vessel not entitled to exercise belligerent rights; (2) that Great Britain was prepared to claim the incriminated cargo as belonging to the British Government. The writer pointed out further, "Capture by an unqualified cruiser is so sufficient a ground for a claim of restoration and compensation that, except perhaps as facilitating the retreat of Russia from a false position, it would seem, to say the least, superfluous to pray in aid any other reason for the cancellation of an act unlawful *ab initio*." This letter concluded with some interesting facts about the constitution of Russian Prize Courts. Under Rule 54 of the Russian Naval Regulations of 1895, a "Port Prize Court" must, for a decree of confiscation, consist of six members, of whom three must be officials of the Ministries of Marine, Justice, and Foreign Affairs respectively. An Admiral's Prize Court, for the same purpose, need consist of only four members, all of whom are naval officers.[1] The gravity of the situation created by the seizure of the *Malacca* was immediately apparent. Mr. Balfour alluded to it in the House of Commons as "this most serious question," and promised to make a statement on August 12. On July 29, 1904, the Marquis of Lansdowne made the following reference to the subject in the House of Lords: "The later phase of the question (as far as international law is concerned) may, I think, be considered to have commenced with the seizure of the P. & O. steamship *Malacca*. That ship, having on board a miscellaneous cargo of about 4000 tons, of which 23 tons consisted of munitions of war, the property of His Majesty's Government, and destined for the dockyards at Hong-Kong and Singapore, was seized on the 13th of this month in the Red Sea. Her passengers and the crew were landed at Port Said, with the exception of the chief

[1] *Times*, July 26, 1904.

officer and two other persons. The ship was sent homewards flying the Russian flag and in charge of a Russian prize crew. We conceived it to be our duty to make a strong representation to the Russian Government in consequence of this occurrence. Our representation was based mainly upon the character and antecedents of the ship by which the seizure was made. That ship belonged to the Russian Volunteer Fleet. She had lately passed through the Dardanelles, and in our view it would have been impossible for her to pass through these Straits if she had at the time been a ship of war. If it be assumed that she was, at the time of her passage through the Straits, a peaceful vessel, it seemed to us intolerable that within a short space of time she should be transformed into a ship of war and should be found harrying neutral commerce in the Red Sea. We mentioned as a subsidiary point in our protest the fact that the munitions of war on board of her were the property of the Government, and therefore could not be regarded as contraband of war. My lords, the result of our remonstrance was as follows. We received, in the first place, from the Russian Government an assurance that the *Malacca* would be released as soon as orders for her release could be conveyed to her. She had left Port Said before these orders could reach her, and she did not touch port again till she reached Algiers, at which place she arrived yesterday. I am glad to say she was released last night, and, I believe, at this moment flies the British flag. My lords, the second result of our representation was that orders were given by the Russian Government to prevent a recurrence of any similar captures by ships of the Volunteer Fleet; and it was also explained to us, that if any such captures should occur before the orders to prevent them could reach their destination, those captures should be regarded as void and the result of misunderstanding.[1]" The subject of the *Malacca* again formed the topic of a discussion in the House of Lords, arising out of a question addressed to Lord Lansdowne by the Marquis of Ripon. It became known that the Turkish Government had allowed other ships of the Russian Fleet to pass through the Dardanelles, after

[1] *Times*, July 29, 1904.

obtaining an official statement that these vessels would fly during their whole voyage the commercial flag, that they would not contain either munitions of war or armament, and that they would not be changed into cruisers.[1] After the exchange of Notes, July 21–23, the Russian Government announced that all seizures effected by the *Smolensk* and *Petersburg* in the interval which elapsed between the date of the determination to place the vessels out of commission, and the date of the communication of this determination to the commanders of the two volunteer cruisers, were to be regarded as void. The *Smolensk* and *Petersburg*—now the *Rion* and the *Dnieper*—were in the Suez Canal under Admiral Bostrovsky on January 13, and thus some five months afterwards both vessels were found acting as commissioned vessels under other names. There is some ground for suggesting that this amounted to an infraction of the undertaking given by the Russian Government in July. The *Smolensk*, a powerful auxiliary cruiser of great size and high speed, could not have accompanied Admiral Rohzdestvensky's fleet to Far Eastern Waters, if she had not evaded treaty obligations by her passage of the Bosphorus on July 6. The fact that several months have elapsed since that evasion can hardly legitimate her share in belligerent operations during the present war, in view of the fact that she was placed out of commission on July 21 by the Russian Government. Several vessels were, in fact, stopped, but seem to have been subsequently released by either the *Smolensk* or *Petersburg*. On July 27 the P. & O. steamer *Formosa* was seized ninety miles south of Dacdalus Lighthouse by the *Smolensk*. The *Agra* was also stopped by the *Smolensk* and the *Petersburg*. On July 27 the German liner *Holsatia* was seized in the Red Sea. On August 22 it was announced that the *Smolensk* had stopped the British steamer *Comedian*, eighty miles off East London, ten miles from shore off the mouth of Basha River. The sequel was not without a compensating element of humour to English observers. Owing to the high turn of speed possessed by the two Russian volunteer cruisers, and to the fact that they both operated in company and kept

[1] *Times*, August 12, 1904.

the high seas, it became apparent that the Russian Government, not possessing at that date any other fast cruisers in the ocean tracks frequented by the *Smolensk* and *Petersburg*, was quite incapable of communicating to the commanders of those vessels their determination to revoke the commissions.

On August 26 it was announced that the Russian Government had requested the British Government to give orders to stop the *Smolensk* and *Petersburg*. The vessels intrusted by our Government to deliver these orders were the *Crescent*, cruiser, Captain T. D. W. Napier, flying the flag of Rear-Admiral John Durnford, C.B., D.S.O., the *Pearl* cruiser, Captain E. P. Ashe, the *Odin*, sloop, Commander L. H. D. Pearce, and the *Forte* cruiser, Captain C. H. Dundas. The sequel illustrated the extraordinary difficulty of arresting on the high seas commerce destroyers of a high turn of speed, for it took more than a fortnight to deliver the orders of the Russian Government to the *Smolensk* and *Petersburg*. On September 8, the *Forte*, being at Zanzibar, after weighing anchor, saw the masts of two suspicious steamers in Menai Bay, South Island. These vessels proved to be the *Smolensk* and *Petersburg*. Captain Dundas delivered to Captain Skalsky of the *Petersburg* the Russian cypher telegram and the formal protest, with the demand of the British Government, calling upon the Russian cruisers to desist from interfering with neutral shipping. The *Petersburg* proved to be armed with seven 5-inch and a few smaller guns. The *Smolensk* was armed with 11 guns of a different calibre. They were followed about by the Hambourg-American liner *Holsatia*, their collier. Had they not been driven in by stress of weather, the commander of the *Petersburg* declared he would not have put into port, and the quest of the *Forte* might have been indefinitely prolonged.

The question, whether a Russian volunteer cruiser is a privateer or not, presents some difficulty. Mr. W. E. Hall, who has treated the question with great care, points out that the use of the commercial flag by vessels of the Volunteer Fleet can hardly be regarded as serious; they are vessels belonging to the imperial navy, and appear to be employed

in time of peace solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. The position of the Russian Volunteer Fleet is in this respect to be distinguished from that of the steamers belonging to the great French mail lines, or from that of the liners subsidized by Great Britain, inasmuch as, in the two latter cases, so long as peace lasts, the vessels are employed in genuinely private and commercial purposes. The only difference between the French mail steamers and the liners subsidized by Great Britain is that the latter are not necessarily commanded, in time of peace, by an officer in the Royal Navy, whereas the former are. It cannot, perhaps, be conclusively inferred from Mr. W. E. Hall's examination of the question that the employment by France of her mail steamers in time of war, or the employment of subsidized liners by Great Britain in time of war, would constitute an infraction of the first article of the Declaration of Paris. On the contrary, Mr. Hall apparently holds that when, in time of war, a vessel is brought into close connection with the State, and is actually incorporated in the regular navy of a State, it cannot be considered a privateer. But he places the legitimacy of the status of vessels belonging to the Russian Volunteer Fleet on at least as high a footing as that of the liners which Great Britain and France propose to employ in times of emergency. It must therefore be concluded that he does not consider the former privateers.[1]

Professor T. E. Holland considered that the *Petersburg* was "an unqualified cruiser," or a "vessel not entitled to exercise belligerent rights."[2] This may imply that, in his opinion, the *Petersburg* was a privateer; but, more probably, expresses the view of Lord Lansdowne, that the vessel could not have passed the Straits if at the time she had been a ship of war.

But it remains true that Sir R. Phillimore, writing at a time when privateering had only been temporarily renounced by Great Britain, employs the expression "maritime volunteer" as merely synonymous with "privateer," and considers that

[1] Hall's "International Law," 5th ed., part iii. c. vii. p. 527.

[2] *Times*, July 25, 1904.

such vessels are necessarily provided with letters of marque, and not with commissions.[1] On this view, if the Russian volunteer cruisers are what they call themselves, they must be privateers. And Mr. Hall's observations are not inconsistent with this view, for he insists that the test is the closeness of the connection between the subsidized or volunteer cruiser and the regular navy, or the degree in which the former is subjected to naval discipline. It is impossible to refrain from observing that the *Smolensk* and *Petersburg*, throughout the entire duration of the raid (July 6–September 8, 1904), operated entirely by themselves, and neither received nor rendered any assistance from or to the regular navy of Russia.

If there is any force in these observations, the operations of the *Smolensk* and *Petersburg* involved an infraction, not only of the treaties closing the Straits, but also of the first article of the Declaration of Paris, 1856.

[1] Phillimore's "International Law," vol. iii. s. 92, p. 137.

PART II.

THE LAW GOVERNING STATES IN THE RELATION OF WAR.

CHAPTER III.

DECLARATION OF WAR AND MANIFESTO.

Authoritative writers on the obligation to declare war.

THE subject of declaration of war may be regarded from the point of view both of authority and practice. Among the long line of writers whose treatises constitute one source of the law of nations, Grotius and Emerigon lay it down that, as a matter of right, war ought to commence with a solemn declaration. Bynkershoek[1] and Heineccius[2] maintain that, although a declaration of war may very properly be made, yet it cannot be required as a matter of right. Grotius thinks war should be declared not so much in order that an enemy may be put on his guard (which is matter rather of magnanimity than of right), but that it may be clear that the war is not undertaken by private persons, but by the will of the whole community, whose right of willing is in this case transferred to the supreme magistrates by the fundamental laws of society.[3]

Sir Wm. Blackstone from the point of view of municipal law.

Blackstone (1 Comm. c. vii.) observes that in order to make a war completely effectual, it is necessary in England that it be publicly declared and duly proclaimed by the King's authority, and then all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever in a nation the right resides of beginning there must also reside the right of ending it, or the power of making peace. And the same check of Parliamentary impeachment, the same writer continues, for improper or inglorious conduct, in beginning or conducting or concluding a national war, is in general sufficient to restrain the Ministers of the Crown from a wanton or injurious exercise of the Government prerogative. These observations of Blackstone were, no doubt, accurate

[1] 2 "J. P.," l. iii. c. ii. [2] "El.," II. s. 198.
[3] "De Jure Belli et Pacis," l. iii. c. iii.

enough in 1767, when the Commentaries appeared. Only five years previously, in 1762, as Sir Travers Twiss points out, England formally declared war against Spain.

Suggested reason for a solemn declaration being regarded as obligatory.

The above quoted observations of Grotius, and no less of Blackstone, suggest that the necessity for a solemn declaration of war was justified by the fact that, at least down to the end of the eighteenth century, the practice of foreign enlistment was generally prevalent. In the time of Grotius many Englishmen and Scotchmen fought in the army of Gustavus Adolphus during the Thirty Years' War. In the reign of George II. Parliament passed measures on the subject of foreign enlistment to discourage the formation of Jacobite armies in France and Spain. It is clear that Grotius was struck by the convenience of a solemn declaration of war at a time when Europe was over-run with large bodies of mercenary troops or *condottieri*, who were not uncommonly engaged in making private war upon one another. Again, in an age when foreign enlistment in times of peace was general, it was no doubt highly convenient for a State to issue a solemn declaration of war in order to recall citizens who might be serving in the armies of other Princes or States, possibly even in those of the enemy. In this connection it is instructive to notice that the altered feeling throughout the Western World on the subject of foreign enlistment roughly coincided in date, at least in this country, with the tendency to commence hostilities without a solemn declaration of war. On the other hand, an obvious explanation of the absence of declaration in English practice during the nineteenth century (the single instance to the contrary occurring in the Crimean War) is the long neutrality which followed the exertions of this country in the Great War.

Solemn declaration of war by Great Britain, 1856.

It is a somewhat curious circumstance that although there has been an unmistakable tendency for solemn declaration of war to fall into desuetude, England should have issued a declaration of war in 1856, the last occasion in which she engaged in a contest in Europe. One recent authority[1] goes so far as to say that the legal effects of war can always be

[1] Dr. T. J. Lawrence,

dated from the first act of hostility, and in fact are so dated, except in the few cases where the struggle is inaugurated by a formal declaration. Fiore [1] is less dogmatic: "It is a question which can be debated whether the commencement of hostilities ought to be established by a formal and solemn declaration of war, or by the publication of a challenge, by a manifesto, or by any other formality. In other ages it was considered necessary to make a solemn and formal challenge to the enemy to legitimize acts of hostility directed against him." Mr. W. E. Hall denies the necessity of issuing a formal declaration of war, while fully recognizing the existence of the dangers likely to arise from unexpected attacks, surprises, and international disloyalty. On the other hand, a foreign publicist, M. Despagnet, insists that a solemn declaration of war constitutes the sole effectual means of averting surprises, to which it may, perhaps, be replied that it is by no means the object or duty of a belligerent to prevent surprises. Mr. Hall's general comment is also sensible, that no forms give security against disloyal conduct.[2] The same writer points out that there is a great difference between the solemn and formal declaration of war and a manifesto. The practice of issuing a manifesto was commended by Vattel.[3] Manifestoes have a "twofold object over and above notice to the enemy, viz. (1) to warn subjects and neutrals of the outbreak of hostilities, and (2) to justify the war in the opinion of foreign Powers." [4] At the commencement of the present Russo-Japanese War, Japan issued a solemn and formal declaration of war,[5] while the Tzar addressed a manifesto to "all his faithful subjects." [6]

Distinction between declaration of war and manifesto.

M. Frantz Despagnet has called attention to the real distinction between the ordinary declaration of war and a manifesto. To assert, he insists, that a manifesto is equivalent to a declaration of war is to be satisfied with a fiction, unless it be understood that hostilities are not to commence until it is reasonably certain that authenticated information of the contents of the manifesto has reached the enemy Government. A

[1] "Nouveau Droit International Public," ed. 1886. [2] 5th ed., p 384.
[3] "Droit des Gens," l. iii. c. iv. art. 62.
[4] Cf. Walker's "Public International Law," p. 104.
[5] *Times*, February 12, 1904, p 3. [6] Ibid, February 10, 1904.

formal declaration of war no doubt in old days furnished the most effective notice to the enemy Government, since in the middle ages the solemn declaration was brought by a special messenger, or *héraut d'armes*, to the court of the enemy, and an interval was commonly fixed between the receipt of the declaration and the commencement of hostilities. M. Despagnet considers that the necessity of issuing a solemn and formal declaration of war is an inference from the Congress of Paris, 1856, but the grounds for this view are not, perhaps, very apparent. Mr. Lawrence has given the true reason for the desuetude into which declarations have fallen: "A careful State can hardly be taken by surprise since the ease of communication in modern times renders the concealment of any unusual concentration of troops almost impossible." It is, however, only with a qualification that the necessity for declarations can be pronounced extinct. As between belligerents, though desirable, they are not essential; as between belligerents and neutrals, they are rightly held a condition precedent of the onerous neutral obligations called into existence by war. Similarly, a declaration of war is a convenient, though not a necessary, method of formally apprizing the citizens of the belligerent of the restrictions imposed upon their trade by the outbreak of war. In Bynkershoek's phrase, "Ex natura belli commercia inter hostes cessare non dubitandum." All trade is at once checked, for no contracts are legal, and no recovery of debts can be obtained in the courts of the countries affected.

The growth of neutral obligation tends to increase desirability of solemn declaration of war.

Writers, like M. Despagnet, who urge the necessity of a solemn declaration of war, are driven to admit that the rule does not apply to either a defensive or a civil war, in which reservation the reflection at once arises that no nation has ever yet on its own admission waged any but a defensive war, so that on this view declarations are likely to be infrequent.

Precedents of solemn declarations of war.

Turning to practice and the history of the topic, in antiquity and throughout the middle ages, the commencement of war was always dated from a solemn and formal declaration. The Greeks and Romans uniformly adopted this practice. Among the latter the Pater Patratus and the Fecial College were especially intrusted with the formal declaration of war.

In the middle ages the declaration was made by letters of defiance dispatched by heralds to the sovereign of the enemy. It was the custom from the twelfth to the fourteenth centuries to interpose a delay of three days between the declaration and the attack. This interval was adopted by Frederic Barbarossa, in his Landfriede, or Constitution of the Peace of the Empire, promulged at Nurembourg in 1187, and also by Charles IV., in the Golden Bulle of 1356. It has been observed that the declaration of war in the middle ages bore no small resemblance to the cartel of a knightly encounter, and probably sprang from the belief that it was the part of a true soldier not to attack his opponent without notice. Occasionally the notice was made the occasion of insult, as when Charles V. of France declared war in 1369 against Edward III. by a letter, the bearer of which was a common servant. In 1427 Amadeus, Duke of Savoy, announced by the formal *litteræ diffidationis* that he was prepared as against the Duke of Milan "cum amicis nostris prosilire, ut dum licet valeamus, Altissimo concedente, conspiratis injuris obviare." Queen Mary declared war by letters of defiance dispatched by heralds against Henry II. of France.[1] In 1657, a Swedish herald brought a declaration of war to the Court of Copenhagen. This appears to be the last instance of declaration of war by the *hérauts d'armes.* In 1671 Charles II. sent a written declaration of war to Holland. But in 1588, Philip of Spain sent the Armada against England without any declaration of war, and Gustavus Adolphus did not issue one when he attacked the German Empire in 1630. From 1700 to 1800, as M. Despagnet points out, nations dispensed more and more with the formalities of a preliminary declaration, and unexpected attacks were even the rule. Thus Frederic the Great in 1740 flung his troops across the borders of Silesia two days before his ambassador arrived at Vienna to demand its surrender. Austria, it is true, observed the old formalities when she invaded Silesia a little latter, but her object was not improbably to excite odium against Prussia by the contrast. The value of the practice is well illustrated by the fact that

[1] Hollinshed's "Chronicles," vol. iv. p. 87.

declarations of war were frequently issued after the war had gone on for some time, as was the case in 1665, when the English declared war against the Dutch, though all through 1664 the two nations had been fighting in Africa, the West Indies, and along the North American coast. Delay in the issue of the formal declaration often occurred naturally enough when the war broke out in distant dependencies, or when one of the parties commenced as an accessory by giving limited assistance to a friend, and afterward became a principal. In such cases as these the treaty of peace sometimes stipulated that all prizes made before the declaration of war should be returned. In the nineteenth century the American wars with Great Britain in 1812, and with Morocco in 1846, were commenced without notice. In the case of the United States there can be no uncertainty as to the commencement of war, for the constitution provides that no hostilities can commence without the authority of an Act of Congress. This Act is a convenient substitute for formal notification by heralds or otherwise. Piedmont and France waged war against Naples and Mexico respectively in the years 1838 and 1860 without previous declarations. It is, however, a singular circumstance that the great European wars of the last half of the nineteenth century witnessed a return to the old practice. On March 28, 1854, Queen Victoria issued a proclamation, containing a declaration of war against His Imperial Majesty the Emperor of all the Russias. In fact, this declaration of war followed upon the entry of the British fleet into the Black Sea on a warlike errand, and preceded the withdrawal of the ambassadors on either side. In the case of the Ionian ships (1855), 2 Spinks, 212, 215, Dr. Stephen Lushington commented upon the declaration of war, which is also discussed by Phillimore, whose work was published during the war.[1] The notoriety of the declaration makes it strange that Sir Travers Twiss should state[2] that this country had not issued a solemn declaration of war since 1762. In 1870 Prince Bismarck handed an official notification of war to the French *chargé d'affaires* at Berlin, who, in turn, handed a formal

[1] "International Law," vol. iii. p. 94.

[2] Ibid., p. 65.

declaration of war by France against Prussia. Declarations of war are, therefore, sometimes bilateral. In 1877 a despatch declaring war was handed to the Turkish representative at St. Petersburg. Formal declarations, after commencement of hostilities, were issued by both belligerents in the Chino-Japanese War of 1894, the announcement being bilateral in this case also. Much controversy was excited by Japan's action at the commencement of the recent war. The events leading up to the outbreak of hostilities appear to be, shortly, as follows. On January 16, M. Kurino, the Japanese ambassador, delivered certain proposals regarding the settlement of Korea and Manchuria. These proposals apparently remained under consideration at the Russian Foreign Office for some three weeks. On February 6, M. Kurino handed to the Russian Minister for Foreign Affairs two Notes, the first of which notified the rupture of negotiations on the ground that Russia was evading a reply to the Japanese proposals, the second announced the dissolution of diplomatic relations and added that the Japanese ambassador, with the staff of the legation, would leave St. Petersburg on the tenth. These Notes were accompanied by a private letter from M. Kurino to Count Lamsdorff, in which the hope was expressed that the rupture of diplomatic relations would be confined to as short a time as possible, a communication which recalls the historic conversation of Napoleon III. with the Austrian ambassador on the eve of the Solferino campaign. Meanwhile, on the 8th of February, two days after the Japanese ambassador had announced that his Government had terminated diplomatic relations with the Court of St. Petersburg, belligerent operations were commenced. According to the evidence at present available, the Russian gun-boat *Korietz* assumed the offensive against Admiral Uriu's squadron, which was escorting some Japanese transports to Chemulpho. The Japanese replied by discharging torpedoes. It appears to be established that the *Korietz* fired the first shot.[1] The next day, Admiral Uriu, having formally called upon the two Russian warships in Chemulpho harbour to surrender, attacked them as they came

History of commencement of hostilities between Russia and Japan, Jan.–Feb., 1905.

[1] *Times*, February 11, 1904, p. 3.

out of the harbour, and a battle ensued off the Polynesian islands, in the course of which both the Russian vessels were sunk.

Japanese declaration of war.

On February 10 the Emperor of Japan issued a solemn declaration of war, of which the text is as follows:—

"We, by the Grace of Heaven, the Emperor of Japan, seated on the Throne occupied by the same dynasty from time immemorial, do hereby make proclamation to all our loyal and brave subjects as follows:

"We hereby declare war against Russia, and we command our army and navy to carry on hostilities against her in obedience to duty and with all their strength, and we also command our competent authorities to make every effort in pursuance of their duties and in accordance with their powers to attain the national aim, with all the means within the limits of the law of nations.

"We have always deemed it essential to international relations, and made it our constant aim to promote the pacific progress of our Empire in civilization, to strengthen our friendly ties with other States, and to establish a state of things which would maintain enduring peace in the extreme East, and assure the future security of our Dominion without injury to the rights and interests of other Powers.

"Our competent authorities have also performed their duties in obedience to our will, so that our relations with all Powers have been steadily growing in cordiality.

"It was thus entirely against our expectation that we have unhappily come to open hostilities against Russia.

"The integrity of Korea is a matter of the gravest concern to this Empire, not only because of our traditional relations with that country, but because the separate existence of Korea is essential to the safety of our realm.

"Nevertheless, Russia, in disregard of her solemn treaty pledges to China, and of her repeated assurances to other Powers, is still in occupation of Manchuria, and has consolidated and strengthened her hold upon those provinces, and is bent upon their final annexation.

"And since the absorption of Manchuria by Russia would render it impossible to maintain the integrity of China, and would, in addition, compel the abandonment of all hope for peace in the Extreme East, we determined, in those circumstances, to settle the question by negotiation, and to secure thereby a permanent peace.

"With that object in view our competent authorities by our order made proposals to Russia, and frequent conferences were held during the last six months.

"Russia, however, never met such proposals in a spirit of conciliation, but by her wanton delays put off the settlement of the serious question, and by ostensibly advocating peace on the one hand, while she was on the other extending her naval and military preparations, sought to accomplish her own selfish designs.

"We cannot in the least admit that Russia had from the first any serious or genuine desire for peace. She has rejected the proposals of our Government. The safety of Korea is in danger. The interests of our Empire are menaced. The guarantees for the future, which we have failed to secure by peaceful negotiations, can now only be obtained by an appeal to arms.

"It is our earnest wishes that, by the loyalty and valour of our faithful subjects, peace may soon be permanently restored, and the glory of our Empire preserved."

The Japanese declaration appeared in the *Times* the day after the Tzar's manifesto, which was in the following terms:—

Manifesto of the Tzar.

"We proclaim to all our faithful subjects that, in our solicitude for the preservation of that peace so dear to our heart, we have put forth every effort to assure tranquillity in the Far East. To those pacific ends we declared our assent to the revision, proposed by the Japanese Government, of the agreements existing between the two Empires concerning Korean affairs. The negotiations initiated on this subject were, however, not brought to a conclusion, and Japan, not even awaiting the arrival of our last reply and the proposals of our Government, informed us of the rupture of the negotiations, and of diplomatic relations with Russia.

"Without previously notifying that the rupture of such relations implied the beginning of warlike action, the Japanese Government ordered its torpedo-boats to make a sudden attack on our squadron in the outer roadstead of the fortress of Port Arthur. After receiving the report of our Viceroy on the subject, we at once commanded Japan's challenge to be replied to by arms.

"While proclaiming this our resolve, we, in unspeakable confidence in the help of the Almighty, and firmly trusting in the unanimous readiness of all our faithful subjects to defend the Fatherland together with ourselves, invoke God's blessing on our glorious forces of the army and navy."

On February 19 the Russian Government issued an official *communiqué* in the following terms:—"Eight days have now elapsed since all Russia was shaken with profound indignation against an enemy who suddenly broke off negotiations, and by a treacherous attack endeavoured to obtain an easy success in a war long desired." A further and more detailed accusation appeared in the *Official Messenger* a few days afterwards. This publication declared that, "although the breaking off of diplomatic relations by no means implies the opening of hostilities, the Japanese Government, as early as the night of the 8th inst., and in the course of the 9th and 10th inst., committed a whole series of revolting attacks on Russian war vessels and merchant vessels, attended by a violation of international law. The decree of the Emperor of Japan on the subject of the declaration of war was not issued till the 11th inst."[1]

A fortnight afterwards there appeared in the *Times* the answer of the Japanese Government to these charges; the document proceeds to advance grounds in support of the contention that Russia's desire for peace was not sincere. The following reasons were advanced: That Russia (1) had persistently refused to meet the proposals made by Japan in a conciliatory spirit throughout the whole course of the negotiations; (2) had put off the settlement of the question

[1] *Times*, February 22.

by wanton delays; (3) had sedulously concentrated her naval and military forces in the Far East.

In support of the last point (which is clearly the strongest), the Japanese State protest averred that during the nine months previous to the commencement of hostilities, after having twice promised to evacuate Manchuria, Russia had augmented the tonnage of her squadron in the Far East by 113,000 tons of war ships. In the last six months of 1903 she had increased her force in Manchuria by 40,000 men, and had made preparations for sending out 200,000 more. The fortifications of Port Arthur and Vladivostock were being strengthened day and night. Forts were being built at Hun Chun, Liao-Yang, and other strategic points. Not only was Russia continually dispatching arms and ammunition to the Far East, but in October, 1903, she forwarded the necessary equipment for a field hospital. All these preparations were intensified at the commencement of 1904. On January 28, 1904, the Viceroy of the Far East, Admiral Alexeieff, ordered the forces on the Yalu to prepare for war. About the same date the Japanese Commercial Agent at Vladivostock was ordered to warn his countrymen to withdraw to Khabarovka. Who, in view of these facts, it was asked, could say that Russia had no warlike intentions, or that she was unprepared for war? Large forces were continually advancing from Liao-Yang to the Yalu; while at Port Arthur all the powerful men-of-war, except one battleship under repair, steamed into the open sea.

Japan was therefore compelled, it was contended, to take measures necessary for her self-defence. The responsibility for the challenge to war must rest with Russia. Finally, allusion was made to the fact that on February 6 the Japanese informed the Russian Minister for Foreign Affairs that he was instructed to break off diplomatic relations and terminate pending negotiations, and that Japan had decided "to take such independent action as she might deem best to defend her position." Great stress was laid upon these last words as naturally including the opening of hostilities. Japan could not be blamed if Russia failed to place the natural and proper

interpretation on the expression "independent action." This learned, lengthy, and luminous reply of Japan finally concluded with observing that a solemn declaration of war is not an indispensable requisite to legitimize the commencement of hostilities. Historical consistency prohibited Russia from controverting this position, because there were not only many instances of Russia taking hostile action without declaring war, but in 1808 she invaded Finland even before the rupture of diplomatic relations.[1]

From the point of view of international law, it is of some interest to examine the contention of Russia, that the breaking off of diplomatic relations by no means implies the opening of hostilities. It has been noticed that by treaty between France and Brazil, June, 1826, hostilities are dated from the withdrawal of an ambassador. But a treaty may be regarded, as Lord Mansfield and Pitt contended, as creating an exception to the general rule. It seems necessary to distinguish between the withdrawal of an ambassador *simpliciter*, and the withdrawal of an ambassador with the entire staff of a legation. The withdrawal of an ambassador, leaving the interests of his Government in the hands of a *chargé d'affaires*, is a well-known method of indicating that the relations between the two States are strained. But this does not by any means imply that war will come. One may cite the recent case of Venezuela and Servia. The British ambassador was withdrawn in either case, and British interests were intrusted to a *chargé d'affaires*.

[1] *Times*, March 2, p. 5.

Russia has not only thus commenced hostilities without withdrawing her ambassador; but, like Korea in the present war, has actually maintained her ambassador in belligerent territory throughout a war. The Polish War of 1792 commenced by M. Bulgakow, Catherine II.'s ambassador at Warsaw, delivering to the King of Poland on May 18 his sovereign's declaration of war. Bulgakow remained at Warsaw throughout the war, which lasted from May 18 to July 23, and was thus enabled to negotiate an armistice in direct communication with the central authorities. In the yet later stages of the final struggle of the Poles for independence, the Russian ambassador, Count Seivier, actually surrounded the Polish Diet at Grodno, November, 1793, with an armed force, compelling it to sign a treaty of allegiance and commerce with Russia, which included new cessions of territory. ("Annual Register," 1792, pt. i. pp. 63, 388; ibid., 1795, p. 23.) It is impossible to believe that any great Power has ever perpetrated such an abuse of diplomatic forms as the above.

But on February 6, 1904, M. Kurino announced to the Russian Minister for Foreign Affairs his withdrawal with the entire staff of the legation. As far as precedents are concerned, they could probably be found to support Japan's action, even assuming the whole gravamen of the Russian charges. Nor could the nations of Europe support Russia's contention with much consistency.

In 1854 the French fleet, in conjunction with the British, entered the Black Sea with orders to compel the Russian squadron to return to Sebastopol before the ambassadors had been withdrawn on either side. The Franco-German War of 1870 serves as a reminder, that even where hostilities are preceded by every possible formality, including a bilateral declaration, the actual commencement of hostilities may take the form of a surprise.[1] Nor is it possible to dismiss entirely the current explanation of the presence of the Russian vessels in Chemulpho harbour. A possible explanation is that they were stationed there to deal with the suspected Japanese plan of landing in this harbour. The facts, firstly, that all authorities in this country were unanimous in holding that a formal declaration of war was not necessary to legitimize hostilities, and, secondly, that England has only once, during a century and a half, since 1762, promulged a declaration of war, account for the indifference with which the Russian charges against Japan was received in England. On the whole, continental opinion concurred. At the close of February an article in the *Neue Freie Presse* opportunely reminded the critics of Japan that Russia invaded Turkey in 1877 on the morrow of the rupture of diplomatic relations without declaration of war.

This precedent was a particularly awkward one for Russian diplomatists, but in fact the current of recent authority was all in one direction. A declaration of war is convenient, but it is by no means necessary. Japan broke no law in striking before the declaration was made, even in the assumption that her vessels, and not those of Russia, struck the first blow. On the other hypothesis, of course, there is not even a case to argue.

[1] Halleck's "International Law," vol. i. p. 524.

In the future, as in the past, a nation which, at the close of a critical diplomatic correspondence, sees the diplomatic staff of its opponent leave the capital is by the practice of nations entitled to no further warning, and will be well advised to mobilize its forces.

CHAPTER IV.

RIGHTS OF WAR WITH RESPECT TO THE PERSON OF ENEMIES.

Admiral Alexeieff and the Sakhalin convicts—Treatment of wounded and prisoners —General Stoessel in Port Arthur.

Admiral Alexeieff's general order, May 24, 1904.

On May 19 Admiral Alexeieff, as Viceroy in the Far East, issued a general order calling out Russian convicts as volunteers.[1] Sakhalin is a penal settlement to which the worst criminals from all parts of the Russian Empire are deported. The Russian population of the island consists exclusively of convicts and ex-convicts, their wives and children, and officials and their families. Out of 7,080 convicts transported since January, 1898, no less than 2,836 were murderers, of whom 634 were women. Out of a total of 22,167 convicts and ex-convicts, quite 8,000 have been sent for murder.[2]

[1] The terms of the general order are given in the *Times*, May 24, 1904: "At my request the Emperor has granted to the exiles at Sakhalin who have expressed a desire to enrol themselves in the volunteer corps the following favours and privileges. (*a*) Each period of two months' active service performed by a convict shall count as a year of penal servitude, to be deducted from his sentence, and those among the convicts who take part in any action against the enemy will be immediately admitted into the class of colonists. Further, colonists who live in the prisons will be transferred to the division of convicts who are allowed to live outside the prisons. (*b*) Prisoners in the division of Correction and Detention will have remitted a year of their sentence for each four months of service with the army; (*c*) for colonists who, on the completion of their term, are to be registered as peasants one month's service will count as four months; (*d*) colonist peasants will have the right to choose a domicile in any province of the Empire apart from the capitals, with the restoration of all their rights except that of owning property."

"The application of these privileges is entrusted to the Governor of Sakhalin, who will have to take into consideration the certificates of good conduct granted by the subordinate heads of convict establishments. All brilliant feats of arms will be reported to me in order that I may reduce the punishment of the convict distinguishing himself, and in exceptional circumstances report them to the Emperor to obtain a full pardon for the author of the achievement."

[2] Cf. "Uttermost East," by C. H. Hawes.

A hundred years ago, it could not be said that a general order like that of Admiral Alexeieff would have been as repellent to the public opinion of the civilized world as it must now be considered. The epigram of Dr. Samuel Johnson, that "Patriotism is the last refuge of a scoundrel," must have passed for a serious reflection in an age in which criminals were systematically permitted, while undergoing sentence, to pass into the army.[1] The Hessian soldiers employed in America by the Government of Lord North were composed, Goltz wrote (1777) to Frederic, "en grande partie des malfaiteurs détachés de la châine." Mr. W. E. H. Lecky observes—

> "During the war of American Independence, large numbers of criminals, of all but the worst category, passed at this time into the English army and navy."[2]

This fact ought to be borne in mind, the historian adds, in estimating the light in which British soldiers were regarded in America during the war of American Independence, and the violence and misconduct of which British soldiers were sometimes guilty. Two or three Acts in favour of insolvent debtors were passed in the eighteenth century, granting them their liberty on condition of enlisting in the army or navy. But that was an age which imprisoned a Goldsmith, a Johnson, and a Collins for debt. Even when full force is given to such facts in the history of this country, they in no way extenuate the course adopted by Admiral Alexeieff. The most abandoned class of criminals did not pass into the English army a hundred and fifty years ago, whereas the convicts of Sakhalin are admittedly composed of the worst convicts in the whole Russian Empire of to-day.

At the time we permitted convicts to be enrolled in the army, it must be remembered that the statute book was constantly adding capital felonies, for offences which would now be considered comparatively venial. The only criminals whose lives were spared by the law were those convicted of

[1] Clode's "Military Forces of the Crown," vol. ii. pp. 12–15.
[2] "History of England," vol. iii. c. xiii., p. 540.

misdemeanour and clergyable felony. Nor can it possibly be doubted, in view of the terrible severity of the law of debt, that many persons of the highest moral character were consigned to prison. There was little or no conceivable objection, socially or morally, to permitting insolvent debtors to enlist in the army.

Tried, therefore, even by the ethical standard of one hundred and fifty years ago, the course of Admiral Alexeieff in summoning the worst class of criminals to the standards of the Tzar is indefensible. The only precedent which seems at all relevant is sufficient to condemn the policy of Admiral Alexeieff. In 1797 the Directory flung eight hundred convicts on shore at Fishguard Bay, Pembrokeshire, from three or four old frigates, which immediately put to sea. The frigates were soon afterwards captured by the militia under Lord Cawdor.

It is noticeable that about the date of Admiral Alexeieff's general order calling for volunteers from the convicts at Sakhalin, complaints as to the treatment of wounded and prisoners by both Russia and Japan showed that the passions of both countries were rising.

Alleged Russian charges against Japan.

It was stated in the *Times* that the Russian Government[1] protested to the Powers signatory to the Hague and Geneva Conventions against the action of the Japanese in firing on a Red Cross train coming from Port Arthur, in which there were two hundred sick and wounded. The Japanese official answer to this charge stated that the train, when approached near Pu-lan-tien by a Japanese detachment, had no special marks as required by the Red Cross regulations. It further stated that Russian soldiers in the train immediately fired upon the Japanese, and that it did not raise the Red Cross flag till it halted. Further, when the Japanese, seeing the Red Cross flag raised, ceased firing, the train escaped. On June 30 it was stated in the *Times* that reports had come in of outrages on Russian wounded, and the military organ at Liao-Yang specified instances of mutilation of which it asserted the Japanese troops to have been guilty.

[1] *Times*, May 2, 1904.

Considering the enormous armies arrayed on either side, and the vast theatre of belligerent operations, it cannot be said that, admitting the accuracy of the Russian relation, it constituted any serious reflection on the great Japanese armies. The instances were relatively small in number, and were attributed by the Japanese to the Chinese marauders.

Gen. Oku's arraignment of Russian conduct in the field.

The Japanese charges on this painful topic seem somewhat more serious. While the Japanese authorities examined carefully the Russian imputations of infringement of the laws of war by Japanese troops, the Russian authorities do not seem to have noticed some very serious and lengthy charges brought against Russian troops for excesses in the field perpetrated by them.

The Japanese War Office published a statement received from General Oku's army arraigning Russian conduct in the field on eleven counts. Of them, two were for abuse of the white flag; one for persistent firing on a field hospital conspicuously flying the Red Cross flag, whereby the Japanese were compelled to remove the hospital amid great danger; two for firing on men of the hospital corps, though they were clearly distinguished by badges; three for stabbing, shooting, and slashing wounded men; two for shockingly mutilating the dead; and one for stealing cattle and horses, and violating women. Besides the above, numerous instances are given in which wounded Russians have fired on Japanese succouring parties. All these charges, preferred with full details, related only to General Oku's army, and were independent of the experiences of General Kuroki's army, which were stated to have been not less shocking.[1]

The picture drawn by these charges is sufficiently terrible, and the Russian Government would have done well to inquire into them. In any event it is pleasant to concede that the outrages charged are sufficiently few in number not to implicate, as a whole, Russian action in the field.

Gen. Kuropatkin on excellence of Japanese hospitals.

It is a relief to turn from this topic to the excellence of the Japanese hospitals, to which General Kuropatkin himself has borne testimony. An officer of the 12th Regiment of

[1] *Times*, July 18, 1904.

Russian *chasseurs*, wounded and taken prisoner at Ka-lien-ta, wrote home from the Japanese field hospital: "Of course, there is no luxury; but, except that we are prisoners, we are much better off than we should be in our bivouacs."[1] Since General Kuropatkin has himself attested the excellence of the Japanese field hospitals, it may fully be inferred that he has endeavoured to secure reciprocal good treatment for wounded Japanese in Russian hospitals.

The Japanese observe the recommendations of the Hague Convention at least as scrupulously as the Russians. Thus, the Government during the war have kept a bureau for the supply of information respecting prisoners. It was officially stated that at the commencement of July the Japanese had a thousand Russian prisoners in their hands, all of whom were well treated. The Japanese Government complained that the Russians did not keep a bureau whence information might be derived of Japanese soldiers or sailors who had been made prisoners.

The Russian Foreign Office, early in August, informed the Red Cross Society that the Japanese Government had declared its willingness to concede to the steamship *Mongolia*, of the East Chinese Railway Company, the rights enjoyed by military hospital ships in virtue of the provisions formulated by the Hague Peace Conference.[2]

It is pleasant to notice that, at all events in the latest phase of the war, the Russians have learned to respect the gallantry of the Japanese. Previous to the great battle south of Mukden, October 13–17, where the Russians had more wounded than the French at Sedan, General Kuropatkin, in an informal conversation with a correspondent, spoke in glowing terms of the bravery of the Japanese, saying that they were a brave foe, and that they were most correct in the laws of war.[3] It is to be presumed, therefore, that the Russian

[1] *Times*, June 30, 1904.

[2] Cf. Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, given *in extenso*, Wheaton ed., 1904, p. 475. It will be there seen that both Russia and Japan were signatories to this convention; and the above circumstance shows that both countries rely on it in the present war.

[3] *Times*, October 17, 1904.

general has become satisfied that the charges advanced against the Japanese of mutilating wounded men, and of firing on a Red Cross train, are either groundless or relatively insignificant.

It may be worth while here to mention a subject that is allied to those above discussed, and which equally raises a question of the laws of war between belligerents.

Rumoured apprehensions of Gen. Stoessel.

Prince Radziwill, who escaped from Port Arthur, said, on arriving at Chifu, that, in a recent address to the garrison, General Stoessel declared that the present temper of the Japanese made resistance to the last drop of blood a necessity, as if the fortress was entered, the Japanese officers would undoubtedly be unable to restrain their men from massacre.[1]

This terrible presage, which may be contrasted with the chivalrous acknowledgment of General Kuropatkin, induces some interesting reflections on history, and, from the point of view of international law, recalls Halleck's statement of the law, that quarter is not given to the garrison in certain junctures, as when besiegers are compelled to deliver an assault and are in overwhelming numbers (ii. 90). Although the reported anticipations of General Stoessel were falsified by the event, the influence of the usage may perhaps be traced in the fact that Port Arthur was surrendered when two important forts were captured, though it might have held out, according to General Stoessel himself, for four or five days longer.

Belligerent usage in besieging towns.

In 1543 the French took Sainct Bony in Piedmont by storm, "et furent tous ceux de dedans tuez, hors mis le capitaine, qui fu perdu, pour avoir este si oultrageux de vouloir tenir une si meschante place devant le canon."[2] But Vattel[3] argues against executing a commandant, and M. Heffter (s. 128) expresses the hope that such an execution will never occur again. Calvo (s. 856) treats it as a still existing opinion that the garrison of a weak place may be massacred for resistance, a conclusion from which it would follow that the garrisons of Arcot, Lucknow, Rorke's Drift, and Mafeking might have

[1] *Times*, September 20, 1904. [2] Mess. de Martin du Bellay, liv. ix.
[3] Liv. iii. c. viii. s. 143.

been massacred in the event of failure with the approval of the law of nations.

The Duke of Wellington, though he never acted in conformity with it, wrote in 1820: "I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of a place and the counterscarp was blown in, was founded upon this understanding." [1]

The great sieges of history with which the Duke of Wellington was connected were those of Seringapatam (1799). Ciudad Rodrigo (1812), Badajoz (1812), and Burgos (1812), At Ciudad Rodrigo and Badajoz undoubted excesses occurred, the latter place was given over for two whole days and nights to the plunder of the British soldiery before order was restored. Ciudad Rodrigo and Badajoz constitute instances where excesses were perpetrated by the undisciplined violence of the private soldiery. Mr. W. E. Hall contends that the massacre of the garrison and people of Ismail by the Russians in 1790 constitutes the single instance of the massacre of a garrison and people. The difference between the slaughter perpetrated at Ismail in 1790 by the Russians, and the excesses which were perpetrated at Ciudad Rodrigo and Badajoz in 1812, was that the former were authorized by the commander, while in the latter two cases the officers did all they could to restrain their men. The terrible words in which Suvarof authorized the slaughter at Ismail are as authentic as any that can be recorded in history, so that no posthumous vindication can be given to him, such as Count Tilly, the commander of the besiegers at Magdeburg, has, Sir H. S. Maine observes,[2] on the whole, succeeded in obtaining.

It is perhaps worth recalling to observe that the slaughter at Ismail, where 30,000 non-combatants perished, exceeds the estimated accepted by Sir H. S. Maine of the holocaust of human life which occurred at Magdeburg.[3]

[1] "Despatches" 2nd Series, vol. i. p. 93.

[2] Lecture, 'International Law," vii. p. 124.

[3] Ibid.

Mr. W. E. Hall, writing in 1880, observed that "if one instance (of the massacre of a population such as occurred at Ismail) were now to occur, the present temper of the civilized world would render a second impossible."[1]

"Yet," as his editor observes, "since these words were written, an even more hideous massacre than that of Ismail has been perpetrated. On November 21, 1894, the Japanese army stormed Port Arthur, and for five days indulged in the promiscuous slaughter of non-combatants, men, women, and children with every circumstance of barbarity. The only excuse alleged was that officers and soldiers alike were roused to uncontrollable fury by the sight of the mutilated remains of comrades who had fallen into the hands of the Chinese and been tortured to death.[2] Though an inquiry was ordered by the Japanese military authorities, no satisfactory explanation or reparation was ever tendered, but the scrupulous anxiety shown by Japan on every other occasion throughout the war to conduct its operation in harmony with the laws of humanity has been accepted in condonation of a solitary, though deplorable, lapse into savagery."[3]

The atrocities after the fall of Port Arthur were witnessed from the top of a steep hill called White Boulders, in Japanese *Hakugokusan*, commanding the whole town, by at least a dozen Europeans, including the military attachés of more than one of the great Powers. The special correspondent of the *Times* observed—

"I saw scores of Chinese hunted out of cover, shot down, and hacked to pieces, and never a man made any attempt to fight. All were in plain clothes, but that means nothing, for the soldiers flying from death got rid of their uniforms how they might. Many went down on their knees, supplicating with heads bent to the ground in *kowtow*, and in that attitude were butchered mercilessly by the conquering army. Those who fled were pursued, and sooner or later done to death. . . . Thursday, Friday, Saturday, and Sunday were spent by the soldiery in murder and pillage from dawn to dark, in mutilation, in every conceivable kind of nameless atrocity, until the

[1] "International Law," 5th ed., p. 400 and note.

[2] *Times*, January 8, 1895.

[3] Hall's "International Law," ibid. *supra*.

town became a ghastly *Inferno*, to be remembered with a fearsome shudder until one's dying day."[1]

The details of this awful scene completely warrant this eloquent and emphatic condemnation. An old man, who, with two boys of ten or twelve years old, rushed into the sea to escape the fury of a licentious soldiery, was followed into the water by a Japanese cavalryman, who hewed them all down. The Japanese alleged in condonation that the townsmen fired on the troops; an allegation which the *Times* correspondent, viewing from a point of vantage the whole scene, was unable to confirm. However, the *Times*, in a leading article, gave credit to the Japanese Government for not suppressing the news. By contrast with the tenuity and obscurity of the news which came to this country of the Blagovestchenk massacre, the Japanese authorities are entitled to some credit for this candour.

But it is a melancholy reflection that the great military empire over which reigned the Emperor Alexander II., so distinguished for his unceasing efforts to abate the severities of war, is a country whose practice exhibits a lamentable defection from the principles he enunciated. The recurrent tradition of Suvarof's savagery at Ismail and Warsaw found a re-echo in the events of the Crimean War, and of Akhal Teke,[2] and culminated in 1900 in the cold-blooded slaughter by the Russians of the whole Chinese population of Blagovestchenk and district.

By some sinister irony, an interesting account of the town of Blagovestchenk was published in the *Times* at the time the massacre was proceeding, though long before the fact was known in England. Mr. Cooke, the commercial agent for this country in East Siberia, furnished the *Board of Trade Journal* with the following account of Blagovestchenk—

"The town is on the Manchurian branch of the Siberian railway, and is the administrative and commercial centre of the Amur region. It lies at the junction of two wide navigable rivers, the Amur and the Blei, and was founded in 1858,

[1] *Times*, January 8, 1895.

[2] Sir H. S. Maine's Lecture, "International Law," viii. p. 144.

since when it has grown rapidly from a small military outpost to a large trading town, with a population in 1897 of 32,600. It has some mills and minor factories, but its industrial position is not as yet of much importance, while commercially it is the centre of the cattle trade of Trans-Baikalia and Mongolia, and also of the Amur gold-mining. It has four banks, and its exceptional position must give it increased importance in the future."[1]

Little did the writer of this appreciation realize that the flourishing town he described was destined, at the time his words reached this country, to attain a sombre immortality as the Magdeburg of the passing century. But the most astonishing part of it is that throughout the whole of the winter of 1900, and even six months afterwards, the massacre about to be related was not realized in its full proportion. The only contemporary account, namely, that which appeared in the columns of the *Times*, dealt generally with the ruthless severity of the Russians throughout Manchuria. A correspondent from Niuchang stated that the native population were treated with the utmost severity. Eye-witnesses reported that the indiscriminate slaughter of non-combatants had reduced the country in the vicinity of the port to utter desolation.[2] Excepting this statement, which rather suggests than states explicitly what had happened, it is impossible to gather a contemporary account.

A lady who visited Blagovestchenk a year after the occurrence[3] gives a full account of the matter. There was, in the light of after-knowledge, a world of significance in a telegram of a few lines which appeared in the *Times* in July, 1900, briefly announcing that Aigun had been fired by the Trans-Zeya detachment of Cossacks, and that the inhabitants of Sakhalin had retreated two versts in the rear, leaving sentries in their trenches. The telegram laconically added that two or three Cossacks were wounded and one killed. The traveller spoken of above discovered that the Blagovestchenk massacre began when the Chinese at Aigun, some forty versts lower down the river, fired at a passenger steamer, and

[1] *Times*, August 21, 1900. [2] Ibid., August 30, 1900.
[3] Ibid., July 15, 1901.

for nineteen days no steamer arrived at Blagovestchenk coming up the river. She related that Aigun, a city of many thousands, was utterly destroyed, and not one inhabitant left in it. Sakhalin was the Chinese quarter of Blagovestchenk.

The Russian officer at Blagovestchenk, General Gribsky, appears to have exhibited apathy and indecision, and finding some signs of hostility manifested by the Chinese population in Sakhalin, he telegraphed to the Governor of Khabarowka for instructions. The terrible answer returned was, "In war, burn and destroy." With a touch of casuistry, Russian officers argued before Miss Allard that General Gribsky was not responsible for the events which happened, inasmuch as the first two words were omitted in the telegram which reached him from the Governor of Khabarowka. The massacre of Blagovestchenk was described by a Russian officer in the following words:—

"The Cossacks took all the Chinese and forced them into the river on boats that could not carry them, and when the women threw their children on shore and begged that they at least might be saved, the Cossacks caught the babies on their bayonets and cut them in pieces."

According to the Russian account, the entire population of Blagovestchenk, a city of five or six thousand inhabitants was utterly blotted out.[1] But it is clear that the above estimate underestimates the dimensions of the calamity, for shortly before it occurred the British commercial agent stated the population of Blagovestchenk to be 36,000. Further, there were thousands destroyed about the same time at Aigun. It is, therefore, impossible not to conclude, with Hall's editor, that not merely in principle, but even in scale, the horrors of Blagovestchenk are comparable to those of Magdeburg, as related in Defoe's "Memoirs of a Cavalier."

In September, 1901, General Gribsky, who was immediately responsible for the massacre of the Chinese at Blagoveschenk, was appointed governor of the Province of Archangel.

[1] *Times*, July 15, 1901.

Another officer, General Orloff, who protested against his orders to slaughter peaceable inhabitants, was degraded, and subsequently his punishment commuted to "an imperial reprimand." Nothing worse than this massacre of Blagovestchenk has ever been related of the unspeakable Turk, whom Collins long ago bracketed in an eclogue with the Russian—

> "The Turk and Tartar like designs pursue,
> Fixed to destroy, and steadfast to undo."

> "Yet none so cruel as the Tartar foe,
> To death inured, and nurst in scene of woe."[1]

There can be no doubt that some of the Allied troops were guilty of great excesses in entering Pekin in 1900. The current reports in the columns of the *Times* spoke of appalling destruction having taken place, rendering the aspect of Pekin one of absolute desolation. Miles of houses were said to have been stripped, first by Boxers, then by Chinese soldiers, and then by soldiers of the relief expedition.

These atrocities were attributed by the Japanese to the Russians at the time.

[1] Collins' Persian Eclogues contain a remarkable prediction, uttered more than one hundred years before, of the extinction of Caucasian independence by Russia, an event that took place, it may be remembered, in 1864.

CHAPTER V.

ESPIONAGE AND WIRELESS TELEGRAPHY IN WAR.

Vattel's definition of spies.

VATTEL defines spies as those who "find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to their employer."[1] As might be expected from a writer described by Chancellor Kent as "very moral and correct,"[2] Vattel treats the topic of espionage from a critically ethical point of view. All persons who are spies, he observes, are punishable with death, either by shooting or hanging, the reason being "we have scarcely any other means of guarding against the mischief they may do us." In modern times a person who is, so to speak, entitled to be shot is not considered a spy, though he renders analogous services.[3] But persons in this category would not fall under Vattel's definition of a spy; though they penetrate the enemy's lines, their object is merely to carry despatches from one commander to another, and not to discover the state of the enemy's affairs. Though Vattel does not distinguish between spies and despatch-bearers, he distinguishes the classes of employment in which a spy may be engaged. He examines the question from the point of view of the State employing the spy, and considers that the employment must be voluntary, and that, except in the case of a very unjust war, it is not permissible, by means of espionage, to seduce the allegiance of a subject, or to tamper with the fidelity of a governor of a fortress.

Reason for death punishment.

[1] "Droit des Gens," l. iii. c. x. s. 179.

[2] *Seton* v. *Low*, Johnson's Cases, vol. i. p. 1.

[3] Cf. "A Project of an International Declaration concerning the Laws and Customs of War," Art. 22; passed at the Conference of Brussels, 1874.

In these respects Vattel's views were far in advance of his age, as, indeed, he admits when he says that the above practices were not contrary to the external laws of all nations.

Frederic the Great employed officers as spies.

In some "Military Instructions" published by Frederic the Great in 1760, he expressly commends the employment of officers as spies. In 1793, when Prussia united with Russia and Austria in issuing a declaration of intention to annex Poland, Frederic William employed Italians as Jacobin emissaries in Poland, for the purpose of invoking the wrath of Catherine II. of Russia against that unhappy country.[1] On the other hand it illustrates, in an age not far removed from that of Vattel, his observation that a man of honour

The Duke of Wellington on spies in Peninsular War.

declines service as a spy, that the Duke of Wellington never knew a French officer engage in treacherous correspondence with the English or sell information.[2] There was, however, one very conspicuous exception, a commissariat officer,

Case of Osire.

Osire by name, who was what Frederic the Great would have called a double spy.[3] Bluntschli observes that the penalty inflicted on a spy is in general out of all proportion with

Sir H. S. Maine on spies.

the crime.[4] Sir H. S. Maine reminds us that "secrecy and disguise are the essential characteristics of a spy in the

Brussels Conference, 1874; balloonists not considered spies.

military sense."[5] In 1870 Prince Bismarck contended that balloonists were spies, because they might make use of information gained by crossing the German outposts, and were out of control. But it is consistent with the definition of Sir H. S. Maine that at the Brussels Conference, balloonists were pronounced not to be spies.[6] On the

Operator by wireless telegraphy.

same grounds of absence of secrecy and disguise, Dr. T. J. Lawrence contends that a newspaper correspondent, who transmits information to his employer from a steamer with a wireless telegraphy installation, cannot be a spy.[7] Mr. W. E. Hall observes that the "Manual of the Institute of International Law" probably states the practice which States

[1] "Annual Register," 1795, c. ii. p. 20.
[2] "Earl Stanhope's Conversations," p. 94.
[3] Ibid. *supra*, pp. 20, 54, 71, etc.
[4] Ss. 628–32, 639.
[5] Lectures, "International Law," vol. viii. p. 148.
[6] Cf. "Project," Art. 22.
[7] "War and Neutrality in the Far East," pp. 86, 87.

will endeavour to adopt on the subject of espionage.[1] By this manual spies cannot be punished *flagrante delicto*, but only after trial. A spy is not answerable for his anterior acts after he has once made good his escape from the territory occupied by the enemy. In the "Soldier's Pocket Book" Lord Wolseley, whose ethical maxims are compared by Sir H. S. Maine to those of Frederic the Great, appears only to recommend stratagem and artifice which, Vattel observes, "have had a great share in the glory of celebrated commanders"[2] in the carrying of despatches. But despatch-bearers were expressly declared not to be spies at the Brussels Conference. In 1796 Colonel Graham, afterwards famous at Barrosa and St. Sebastian, penetrated Napoleon's lines successfully with a message from Wurmser to the authorities at Vienna. Previously the French intercepted a messenger carrying a despatch rolled up in a tiny ball of sealing-wax.[3] Such services do not amount to espionage.

Lord Wolseley on the carrying of despatches.

Espionage is regulated by the laws of war, and of course requires to be carefully distinguished from Secret Service in time of peace, which the revelations of the Dreyfus Case and the Boer War demonstrated to have risen to such an extraordinary height.[4]

Espionage contrasted with Secret Service.

It seems clear that the Russo-Japanese War has produced, at least, one case of espionage which rivals in its tragic *dénoûment* the case of André or Ney. It is impossible to give any details, but the *Times*, March 21, 1904, published a brief semi-official *communiqué* from St. Petersburg, stating that a cavalry captain, Irokoff by name, had been executed for having sold secret plans for the organization of the field army to Japan. Later, the *St. Petersburg Journal* announced that a "Capt. Ivkoff," who was immured in the fortress of St. Peter and St. Paul on the charge of selling

The case of Capt. Irokoff, March 21, 1904.

[1] "Manuel de l'Inst. de Droit Int.," Art. 21.

[2] "Droit des Gens," l. iii. c. x. s. 178.

[3] Cf. Thiers's "Campaigns of Napoleon," with Notes by E. E. Bowen, p. 159.

[4] Lord Salisbury stated in the House of Lords that he was told on high diplomatic authority that the Transvaal Republic spent in one year £800,000 in Secret Service (*Times*, Jan. 31, 1900). At the Dreyfus trial at Rennes, Col. Picquart gave some interesting disclosures as to the number of persons engaged in espionage, and the large sums they demanded (*Times*, Aug. 19, 1899).

State documents to Japan, had committed suicide by opening an artery with a tie-clip.[1] The possibility, to say the least, that "Capt. Irokoff" may be "Capt. Ivkoff" recalls an incident in the controversy about the Man in the Iron Mask, where a person suspected of being the *masque du fer* disappears, and no date can with certainty be assigned of his death. This is Count Matthioli, minister of Charles IV. of Mantua, who was imprisoned in 1679 by Louis XIV. for having disclosed to other States the secret treaty under which the fortress of Casalé was ceded to France. It is known that Matthioli was taken to the Îles de St. Marguerite, the State prison near Cannes. In 1694 four State prisoners were conveyed thence to the Bastille; but the one who had been longest confined died on the way. Matthioli, who is frequently mentioned by name in the reports of the Governor of the Île St. Marguerite up to 1694, is never mentioned after that date. The Man in the Iron Mask survived till 1703. M. Topin, on this evidence, is still inclined to believe that Count Matthioli is the *masque du fer*. In the genealogical tree of the Matthioli family, the date of this Count Matthioli is left a blank. Mr. Andrew Lang considers, on the other hand, that the Man in the Iron Mask was Eustache d'Auger, all that is known of whom is that he was an obscure spy. The fate of Capt. "Irokoff" or "Ivkoff" must be added to the myriad mysteries of the Fortress of St. Peter and St. Paul. If so favourable an observer to Russia as Mr. H. Norman is to be believed, the arcana, not only of the fortress of St. Peter and St. Paul, but in an even higher degree, those of the fortress of Schlusselberg, are far more impenetrable than those of the Bastille. In this, as may be expected, he is confirmed at all hands by Stepniak.[2]

The case of Major André.

The well-known case of Major André raised, in an instructive form, the distinction between a noxious person who is entitled to an honourable death at the hands of a belligerent, and a spy in the technical sense. A reference to Vattel

[1] *Times*, July 5, 1904.

[2] Cf. Mr. H. Norman's "All the Russias," 1902, p. 20, and Stepniak's "Russia

shows that the English Government were free from any blame. It may be remembered that André conducted negotiations with Benedict Arnold for the surrender of West Point in 1780. In view of the intestine divisions among the Americans themselves, the case was not an ordinary one of tampering with the fidelity of a governor of a fortress. This Vattel in so many words condemns, except when a war is unjust. But it is doubtless allowable, Vattel observes, to take advantage of intestine divisions among the enemy. Further, on his view the English Government were justified in employing André on the service as it was an exceptional case, and one of the highest importance, in which event Vattel holds the sovereign is entitled to require such service. As Vattel considered a person who is entitled to be shot a spy, it is impossible to cite him as disapproving the manner of Major André's execution. But General Halleck comments on the brutality with which Major André's request to die like a soldier was denied him, and seems to admit that he was not technically a spy, although he was in disguise when taken.[1] Sir R. Phillimore considers that "the manner of André's execution was scarcely justifiable by the sternest laws of war."[2] As the disguise is admitted even by General Halleck to have been accidental, it is impossible to consider that André was a spy who is liable to a felon's death.

According to Manual of Institute of International Law, André ought not to have been executed.

According to the Manual drawn up by the Institute of International Law on the subject (Article 26) a spy is not answerable for his previous acts, after he has succeeded in getting out of the territory occupied by the enemy. André had passed the last American posts when he was apprehended. Mr. W. E. Hall observes that States will in future probably adopt the articles of the Institute of International Law on this subject, and according to them, André ought not to have been

Under the Tzars," vol. i. p. 232, and c. xix. Ibid., for a description of the Fortress of St. Peter and St. Paul: "an immense building, wide and flat, surmounted by a meagre, tapering, attenuated spire, like the end of a gigantic syringe. . . . Every quarter of an hour the prison clock repeats a tedious, irritating air, always the same—a psalm in praise of the Tzar" (Ibid., p. 205).

[1] "International Law," vol. i. p. 573.

[2] Ibid., vol. iii. p. 150.

executed. By Statute 29 & 30 Vict. c. 109, s 6,[1] spies can be tried by a naval court-martial, and shall suffer death or other punishment. The Army Discipline Act, 1881, part i. s. 4, ss. 3, punishes a member of her Majesty's forces who gives treacherous information to an enemy.

Modern inventions and war.

It is pointed out by Sir H. S. Maine in his lectures on International Law that the rapid progress of the inventive science of modern times has tended to entirely refute the axiom of Grotius, "War is not an art."

Wireless telegraphy in war.

Its use first demonstrated.

The astonishing discoveries of Marconi have tended still further to discredit the axiom of Grotius. A few days after the Hague Peace Conference, at the British naval manœuvres of that year (August 9, *et seq.*, 1899), this new application of science demonstrated itself to be, in the words of the *Times*, of "already the utmost value for a variety of naval purposes."[2] A correspondent of the *Times*, "Navalis" observed that, drawing deductions from the experience at the manœuvres, it was difficult to over-rate the value of wireless telegraphy as a new means of communications. The original drawback to wireless telegraphy that signals can be intercepted remains. This liability seems appreciably to have influenced important belligerent operations in the present war, and the risk of obstruction has perhaps even more clearly militated against its use. When wireless telegraphy can be rendered syntonic so that the transmitter shall only send and the receiver only respond to vibrations of a preconcerted pitch, communication between vessels out of sight of each other will be a perfectly safe operation in time of war. Nothing can be more instructive or convincing than the remarkable experience of the *Times'* experiment in wireless telegraphy in the Far East, under conditions which were not at all favourable.

Experience of the *Times'* correspondent in the Far East.

The following explanatory facts collected from the *Times* are of general interest, and to some extent justify the Russian protest. Under favourable conditions it takes at least three weeks to bring a wireless station into working order. The De Forest system operates with certainty up to two hundred miles

[1] Naval Discipline Act.

[2] *Times*, August 18, 1899.

when there is a mast 180 feet high both at the receiving and remitting stations. The *Times'* plan involved, of course, the correspondence of a remitting station on the steamer and a receiving station on land at Wei-hai-Wei. By means of an electric exciter it is possible to transmit messages from the shore station to a vessel. The experience of the *Times'* correspondent showed that messages could be sent, not only over the sea, but over intervening land, even when it was a mountainous corner of a promontory, the hills of which varied from 200 feet to 1860 feet, or islands such as the Prince Edward Islands. It appears that if two vessels fitted with wireless working stations are practically in juxtaposition, the rival sparks somewhat interfere with the messages even under the De Forest system. But it is claimed for this system that, unless this is the case, by means of the telephonic receiver messages can be sent through, over, and above those of competitors in the vicinity fitted with wireless stations.

It appears, from the experience of the *Times*, that the masts under the De Forest system, need not be exactly of the same height, whether the height is or is not supplemented by wire exposure. The shore station of the *Times* was 100 feet above the sea, and therefore while the top of one mast was 280 feet above the level of the sea, the top of the other was only 180 feet above sea level. The height of the mast on the station on the ship was supplemented by 102 feet of exposure on board the ship. This worked perfectly well, so far as transmitting messages from the vessel to the shore station up to one hundred miles was concerned. The remission of messages from a shore station is facilitated by attaching copper plates in the sea to a lead wire over the face of the cliffs. There is no difficulty in determining the nature of the act in the case of a rival operator at a wireless station who intercepts a despatch from one belligerent and transmits it, either by wireless telegraphy or otherwise, to the other belligerent. Such a person is clearly a spy as defined in military manuals, since he collects secretly information of the designs of one belligerent and communicates it to the other. It is, however, necessary to remember that secrecy and disguise are the

essential characteristics of a spy. It was, in fact, just because these characteristics were wanting in persons travelling in balloons, that the view taken by the Germans in 1870 was indefensible. The question, therefore, appears to depend, so far as the interception of messages is concerned, on the feasibility of disguising a vessel fitted up with a wireless station. But a message, it has been seen, may not only be intercepted, but also obstructed by competitors transmitting meaningless messages or even false information.

These liabilities lead to important consequences. A despatch may decide the fate of a whole campaign, as is pointed out by Phillimore, and is necessarily contraband of war. In the present war, if a Japanese vessel fitted with a wireless station could have successfully disguised herself as a Russian man-of-war she could either transmit false information to the shore station at Port Arthur, or receive thence valuable information, provided, of course, her commander had the key to the Russian cypher. In the latter case disguise would be necessary in order to consummate the deceit. A person who obstructs or prevents the delivery of a message from the commander of the land force of a belligerent to the commander of that belligerent's sea forces may be compared to a cavalry patrol of one belligerent which intercepts messages from one portion of the other belligerent's forces to another operating in the vicinity. A person who secretly intercepts despatches on land is clearly a spy. The problem seems to be confined to operations on a littoral. A person could not suddenly construct a wireless station on land and intercept the messages of a belligerent, since it takes at least three weeks to construct a wireless station. It is difficult to maintain that secrecy and disguise are as impossible in the case of a vessel fitted with a wireless station as they are in the case of a balloon. The two cases are further widely to be distinguished in the nature of the information it is possible to obtain. A person who travels in a balloon can only, under favourable circumstances, steal a transient glance at the disposition of an army. But the knowledge gained by intercepting a despatch, or the service rendered to a belligerent by preventing his enemy

from transmitting a message, may easily in both cases be invaluable.

The employment of wireless telegraphy in war is a question which presses more for a solution than the status of persons travelling in a balloon, however hostile may be their motives. It is far from certain that the Hague Conference will repeat, in the case of wireless telegraphy operation, the decision it gave (Art. 31) in the case of persons travelling in a balloon. The conviction of the *Times'* correspondent that, as far as neutrals are concerned, the use of wireless telegraphy in war will be forbidden, is probably well founded, and in future operators not identified with the public forces of either Power are not unlikely to be treated as spies by the belligerent to whom their presence is offensive.

CHAPTER VI.

LAYING MINES IN MID-OCEAN AND THE USE OF BALLOONS IN WAR.

International law and the horrors of war.

THE above topic is connected with an important chapter in international law which has for its object the mitigation of war. A complete exposition of the subject would involve reversion to the Lateran Councils, the horrors of the siege of Magdeburg, and the humanitarian policy of Alexander II. of Russia. Sir H. S. Maine shows that the excesses of Tilly produced as indelible an impression on the mind of Grotius as the excesses of revolution produced on the imagination of Edmund Burke. Nor is it inconsistent with this view that "the fury of fighting" which appeared in the religious wars was calming down when Grotius began to write. Burke denounced Mirabeau while the Revolution in France was culminating, but at a time when people in England had their minds steadily opposed to events in France. Vattel, the most humane of publicists, was mitigating the severities of war in an age of maritime wars. Naval usages, Sir H. S. Maine observes, are reasonable and humane on the whole, because belligerents can be checked by neutrals in a maritime war. One need only recur to Mr. W. E. Hall's Introduction to his "International Law" to appreciate the fact that international law advances, as the Latin poet observed of justice generally, with slow progression. Mr. Hall anticipated that international law would arrive at maturity some time after the next great war. These presages were made in 1888, and the Russo-Japanese War seems to supply the situation which he contemplated.

Sir H. S. Maine and the philosophical conception of the law of nature.

It is worth while, in view of the progress of science, to recall some observations of Sir H. S. Maine[1] on the intimate connection between the law of nature and humanity, the influence that the law of nature had on all the authoritative writers of international law, and his judgment that "Philosophically that principle (*i.e.* the Roman conception of the laws of nature) is not now much cared for." The Roman conception of the law of nature is well known to have been derived from the Stoics.

Zeno, the founder of the Stoic school, went back primarily to Herakleitus for a systematic grounding, not only of his ethics, but of his physics. In particular, Zeno derived from Herakleitus the conception of the law of nature which the Romans borrowed from the Stoics, and which has influenced international law—that there is but one law which governs the course of nature and ought to govern the actions of men.[2] Sir Oliver Lodge, in an address delivered on January 5, 1904, at Birmingham, on "What Radium means," observed that the most important consequences of the discovery of M. Curie were intra-atomic activity, and the liability of all atoms to break up or explode. But this, Sir Oliver Lodge added, showed that the principle of Herakleitus—that nothing has permanence—was absolutely correct.[3] The leading conception of Herakleitus' physics, borrowed by the Stoics, which has influenced international law through the Romans, has therefore received a late vindication by the discoveries of Curie. Herakleitus also says that everything is in motion, a remarkable statement at the time, though it has now been known for centuries that everything is in motion. The interest of Herakleitus' philosophy in connection with the liability of atoms to break up or explode arises from the circumstance that the philosopher of Ephesus equally declared that "nothing is certainly," and that "nothing remains or abides." In ethics the school of Determinism is

[1] "International Law," lect. vii. p. 126.

[2] Zeller's "Outlines of Greek Philosophy," English authorized translation, p. 233, s. 67.

[3] *πάντα ῥεῖν εἶναι δε παγιώς οὐθέν*, Arist. "De Coelo," III. i. 298, b. 29; Zeller, Ibid. *supra*, p. 67.

gaining ground at the expense of the Libertarians, and the ethics of Herakleitus are strictly consistent with Determinism.

The humanity of the Middle Ages.

In the Middle Ages weapons of a far more merciful character than the modern mine or torpedo were condemned. The poisoning of water and food, on the other hand, which is prohibited in modern military manuals, was equally disallowed by the Greeks and Romans.[1] The ancients may have prohibited poisoning either because arsenic (the only poison then known) causes death, coupled with the extremest pain, or because of the idea that poison was not fair fighting, a very strong feeling in ancient days. In the manual for English officers poisoning is prohibited because it is calculated to produce unnecessary pain or misery in connection with poisoned weapons. Sir H. S. Maine observes that "assassination began to be regarded with peculiar horror after the Reformation." He alludes to the fierce denunciations of assassination that arose on the assassination of William of Orange at Delft, 1584, by Balthasar Gerard. The execution of Gerard was, however, attended with terrible cruelty, greatly exceeding even that attending the punishment inflicted for treason in our law at that time.[2] "Cruciatus legibus invisi." The revulsion of the opinion of the civilized world reached its apogee during the great war, when Mr. Fox, then Foreign Secretary, warned the Great Napoleon of a scheme to assassinate him. Sir H. S. Maine observes, "The feeling elicited by this proceeding of the English Foreign Secretary was so strong and has so little decayed, that I think, with the writer of the "Manual," we may safely lay down that assassination is against the laws of war." It is curious to recall a passage of Sir H. S. Maine's lectures, where he says,

Assassination, when a danger.

"There will always, of course, be some danger of this crime being resorted to when a war, as is sometimes the case, appears to depend entirely on the life of one individual —a great statesman or a great general."[3]

[1] Sir H. S. Maine's Lectures, "International Law," p. 130.

[2] Van Leeuwen's "Roman Law," vol. ii. p. 258, by Chief Justice Kotze; and cf. Emanuel van Merwen's History, bk. xii., and Peter Bowe's "Nederlandsche Historien," bk. xviii. p. 55.

[3] Lectures, "International Law," p. 137.

Cordua's plot, August, 1900.

A Boer plot, which had for its object the kidnapping of Lord Roberts at Pretoria, August, 1900, will be in general recollection.[1]

Attempt to assassinate Gen. Kuropatkin.

Sir H. S. Maine's observation, in view of General Kuropatkin's high reputation as the conqueror of Kashgaria, the enormous losses he inflicted on the Japanese at the battle of Liao-Yang, and his skilful retreat from that place, has a certain interest in connection with a more or less circumstantial account that an attempt was designed upon his life.[2] The incident is alleged to have occurred at Niu Chang, and the attempt was apparently frustrated by the vigilance of his Cossack Guards.

Lateran Council, 1139, proscribe the cross-bow.

In 1139 the Lateran Council put an anathema on the use of the crossbow, which led to its disuse. When Richard I. revived the use of this weapon, anathematized by the Lateran Council as "artem illam mortiferam et Deo odibilem," his death by a crossbow bolt at the Castle of Chaluz, near Limoges, was regarded by a great part of Europe as a judgment. A most important consequence of this anathema was the continued employment of the older weapon, the longbow, which led to the English successes in the wars with France.

Proscription of the bayonet in 15th and 16th centuries

On the invention of the musket its use was proscribed during two or three centuries. "The Chevalier Bayard thanked God in his last days that he had ordered all musketeers who fell into his hands to be slain without mercy. He states expressly that he held the introduction of firearms to be an unfair innovation on the rules of lawful war. . . . Marshal Mont Luc (1503–1577), who has left memoirs behind him, expressly declares that it was the usage of his day that no musketeer should be spared.[3] The bayonet, which turns a musket into a weapon which is at once a firearm and a lance, was known long before it was used." Frederic the Great used it universally, and is said to be the first commander who resorted to it. Sir H. S. Maine ascribes the green uniform of the Rifle Brigade to the proscription of the bayonet and

[1] Cf. Conan Doyle's "Great Boer War," complete edition, p. 498.
[2] *Times*, April 26, 1904.
[3] Lecture, *supra*, p. 139, 140.

musket. The green uniform was supposed to protect from observation, and this was more than ever necessary when no quarter was given to soldiers using the bayonet and musket.

Proscription of red-hot shot.

The same writer observes that "Red-hot shot was at first prohibited," and he points out that the musket was proscribed long after the prohibition against the use of red-hot shot had fallen into desuetude. The musket was forbidden in the age of Chevalier Bayard and Marshal Mont Luc, that is, in the sixteenth century. The French Vice-Admiral, Marshal Conflans, issued an order of the day, November 8, 1759, forbidding the use of hollow shot against the enemy, on the ground that it was not generally employed by polite nations, and that the French ought to fight according to the rules of honour. The same view was taken of the use of hot shot, grape, chain shot, split balls.[1] The *Tourterelle*, a French ship, in an action with the *Lively*, used red-hot shot. The employment of hot shot is not usually deemed honourable warfare; but the blame, if any, rested with those who had equipped the ship for sea.[2] Among the langridge which the American privateer, the *General Armstrong*, used in 1814, against the British ship *Plantagenet's* boats, were nails, brass buttons, knife blades, and the consequence was that the wounded suffered excruciating pain before they were cured. These are among the examples cited in Halleck.[3] Of course, he disapproves of the last instance, but the only limitation he places on the use of weapons is that the wounded must not be killed, nor injuries inflicted in a manner which does not contribute to the decision of the contest. This author regards every great discovery in the art of war as having a life-saving and peace-promoting influence. On this view scientific discoveries tend to shorten wars, and the same writer quotes the effect of railway communications in bringing to a decisive issue the battle of Montebello, in 1859, by enabling

[1] D. F. Butler, "Address Mil. Prof.," p. 25; Ortolan, "Diplomatie de la Mer," iii. c. l.

[2] James, "Naval History," vol. i. p. 283.

[3] "International Law," vol. i. pp. 562, 563.

the French to hurry up large reinforcements at a critical moment. It is impossible not to observe that the railway has exerted a similar influence in many other battles, and it can certainly be credited with the abbreviation of many modern campaigns, especially in the Soudan and South Africa. Until the present war, it seemed clear that wars have tended to become shorter. This was observed by Lord Wolseley, in his anticipation that the next great European campaign would only last a fortnight. Sir H. S. Maine agrees, "It is a satisfactory reflection that wars have, on the whole, become less frequent, and they have also become shorter."[1] The Hundred Days of 1815 affords an instance to the contrary, since it was fought before all the extraordinary improvements in weapons of war had been made. The brevity of this campaign must be ascribed, *inter alia*, to political and dynastic reasons. The Soudan campaign of Lord Kitchener, the Transvaal War, and the present struggle show that, even with the more favourable circumstances, modern war may be of long duration. But it is not easy to deny that the effect of science has been to shorten wars both by affording rapidity of communication, and by furnishing weapons of great destructive power.

The landmarks of modern international law on the topic of the proscription of weapons are the Declaration of St. Petersburg in 1868, the Conference of Brussels in 1874, and the Hague Peace Tribunal of 1899.

Declaration of St. Petersburg, 1868.

By a declaration between Great Britain, Austria, Bavaria, Belgium, Denmark, France, Greece, Italy, Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden and Norway, Switzerland, Turkey, and Wurtemburg, signed at St. Petersburg, December 11, 1868, the contracting parties engaged to renounce, in case of war among themselves, the employment by their military or naval troops of any projectiles of weight below 400 grammes, which are either explosive or charged with fulminating or inflammable substance. This engagement does not oblige when, in a war between contracting or acceding parties, a non-acceding party

[1] Lecture, "International Law," vii. p. 141.

joins one of the belligerents. Maine observes of the Declaration of St. Petersburg that it "has no longer its humane effect in consequence of the progress of science, which, I am sorry to say, has often had the effect of defeating attempts to increase the area of humanity. It is alleged that the conical bullets, which are universal in modern armament, do, in fact, cause pain as severe, and wounds as incurable, as ever did the explosive bullets which were just coming in about the year 1868."[1] But this circumstance, in turn, Sir H. S. Maine observes, does not affect the opinion of the whole civilized world announced at St. Petersburg, that lawful usage does not warrant any state in causing injuries which give more pain than is necessary for a comparatively humane object, that of disabling the enemy.

Conference of Brussels, 1874.

In 1874 a conference, attended by delegates from all the countries of Europe, assembled at Brussels, on the invitation of the Emperor of Russia, for the purpose of discussing a project of international rules on the laws and usages of war. A series of rules was agreed to, but no international compact followed. Nevertheless, though not absolutely binding, the rules were of great value as exhibiting the prevailing ideas in a definite form, and many of them have found a place in the Manuals of War now issued by civilized governments for the instruction of their officers in the field.

Reasons for comparative failure of.

The Brussels convention was given its death-blow, Sir H. S. Maine observes, by the English Foreign Secretary of State. The reason alleged was that many of its suggestions owed their origin to military officers of the Great Powers, and were calculated to arouse opposition from the representatives of the smaller Powers, and from those of the Powers who had not yet adopted the system of great armies raised by conscription. In the opinion of Lord Derby, the effect of these provisions would have been to facilitate aggressive wars, and to paralyze the patriotic efforts of an invaded people. Sir H. S. Maine attributes the failure of the Brussels Conference, 1874, to the recency of the passions excited by the Franco-German War of 1870.

[1] Lectures, "International Law," vii. p. 136.

Final Act of Hague Peace Conference, 1899.

The final Act of the Hague Peace Conference contained three declarations, which prohibit on the part of the contracting Powers:

(1) For a period of five years, the launching of projectiles from balloons or by other similar new methods.

(2) The use of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases.

(3) The use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

No limitation set to use of mines or torpedoes.

None of these declarations was signed by the British representatives, and the first only by those of the United States. It will be seen that neither the Declaration of St. Petersburg, 1868, the Declaration of Brussels, 1874, or the Hague Peace Conference, 1899, contained any limitation of the use of mines or torpedoes. The Manual for the use of British officers in the field declares torpedoes and mines (which it associates) to be legitimate weapons, and therefore considers there is no reason why officers or soldiers using them should be refused quarter, or be treated in a worse manner than other combatants. When the torpedo was invented, it was received with downright execration. It first made its appearance in the war between the revolted colonies, now forming the United States, and the mother country, and it was then known as the "American Turtle." Many attempts to obtain an improved form of it were made during the war between England and France, when Napoleon and his armies were threatening the coast. The principle of using clockwork had already been invented, but the peace of 1814 put an end for the time to that method of invention, and it was long before the world heard again of the "catamaran," as the torpedo was next called." [1]

Sir H. S. Maine on the history of the torpedo.

The torpedo and the mine in the Russo-Japanese War, 1904.

While both mine and torpedo are now well established as between belligerents, a further question arises as to the rights of neutrals. The Russo-Japanese War of 1904 has given rise to the very contingency which Sir H. S. Maine and

[1] Sir H. S. Maine's Lectures, "International Law," vii. p. 142.

a celebrated French admiral declared would involve the proscription of the torpedo as a weapon even between belligerents.[1] On July 16, 1904, the British steamer *Hipsang* was torpedoed by a Russian destroyer off Port Arthur, according to the finding of the Naval Court at Shanghai, August 23, without any just cause or reason. And another incident, while it did not actually involve consequences to a neutral, was of so dangerous a tendency as to attract wide notice. In May 1904, Admiral Togo reported: "While the fleet was watching the enemy off Port Arthur, the *Hatsuse* struck an enemy's mine. Her rudder was damaged, and she sent a message for a ship to tow her. One was being sent when another message brought the lamentable report that the *Hatsuse* had struck another mine and had sunk immediately after. She was then ten knots off the Liau-tie-Shan promontory. There was no enemy in sight, and her loss must have been caused by a mine or submarine." Three hundred officers and men were saved, and she sank in thirty minutes.

The destruction of the *Hatsuse*, ten miles from land.

Neutral vessels on the high seas.

The significance of the incident, from the point of view of international law, is that the vessel was sunk in the open sea, apparently by a mine, far beyond the territorial limit of three miles, within which such an operation could only, according to Professor T. E. Holland and Dr. Theodore Woolsey, be safely conducted without constituting a most unwarrantable interference with the right of a neutral to navigate the ocean without incurring such a risk. The two fundamental postulates involved are (1) that, theoretically, neutral ships, whether public or private, have a right to pursue their ordinary routes on the high seas in time of war; (2) that belligerents have an absolute right to fight a naval battle on the high seas, the scene of which can be approached by neutral ships only at their proper risk and peril. But as the report of Admiral Togo specially states that the enemy were not in sight when the *Hatsuse* sank, the last consideration does not arise. A neutral ship passing at the time would not have contributed to her own loss if she, and not the *Hatsuse*, had been blown up.

[1] Sir H. S. Maine's Lectures, "International Law," viii. pp. 146–8.

Professor T. E. Holland observed, "It is certain that no international usage sanctions the employment by one belligerent against the other of mines, or other secret contrivances, which would, without notice, render dangerous the navigation of the high seas. No belligerent has ever asserted a right to do anything of the kind, and it may be in the recollection of your readers that strong disapproval was expressed of a design, erroneously attributed to the United States a few years since, of effecting a blockade of certain Cuban ports by torpedoes instead of by a cruising squadron. These, it was pointed out, would superadd to the risk of capture and confiscation, to which a blockade runner is admittedly liable, the total destruction of the ship and all on board. It may be worth while to add, as bearing upon the question under discussion, that there is a tendency in expert opinion toward allowing the line between territorial waters and the high seas to be drawn at a considerably greater distance than the measurement of three miles from the shore." [1]

Prof. T. E. Holland on laying mines in mid-ocean.

It is reasonably clear that the reason for the fixing of three miles from the coast as the limit of territorial jurisdiction was that it then represented the range of cannon shot. The expression of Bynkershoek is "quousque tormenta exploduntur," "ubi finitur armorum vis." [2]

The principle of the limit of territorial waters.

If ever, therefore, the maxim "cessante ratione, cessat ipsa lex" admitted of application, it applies to the case where, the limit of territorial jurisdiction being "fighting distance from land," improvements of artillery have caused that distance to be extended from three to fifteen miles. The first instance in which it was urged that modern improvements in artillery logically involve the extension of the limit of jurisdiction over territorial waters, was the protest of the U.S. Consul at the Cape, 1863, on the occasion of the capture of the American barge *Sea-Bride* by the *Alabama*, August 6, 1863. In this protest, addressed to Sir Philip Wodehouse, then Governor of the Cape, the Consul for the United States (Mr. W. Graham) observed, "I believe there is no law defining the word 'coast' other than international law. That law has always limited

[1] *Times*, May 25, 1904. [2] "Quæstiones Juris Publici," c. viii.

neutral waters to the fighting distance from land, which, upon the invention of gunpowder, was extended to a distance of three nautical miles from land on a straight coast, and by the same rule, since the invention of Armstrong rifled cannon, to at least six miles."[1] The *Alabama* captured the *Sea-Bride* two miles and a half from the nearest point of land, which was Robben Island. Historicus considered that this incident involved an infringement of the neutrality of Great Britain, as it clearly did, on the assumption that the capture took place two miles and a half from the nearest point of land.[2] It is difficult to understand why, if the capture took place within the three miles' limit, the American Consul should have gone out of his way to insist that logically that limit should be extended. In any case, the incident deserves notice as constituting the first instance of the expression of the tendency in modern expert opinion.

The result of admitting this tendency in the case of the *Hatsuse* would be the conclusion that the mine by which the *Hatsuse* was blown up was laid, not in the high seas, but in territorial waters. The report of Admiral Togo states definitely that the *Hatsuse* was blown up ten miles from the nearest land. But the range of modern cannon is fifteen miles, and therefore, if this limit were adopted, it would be necessary to conclude that the *Hatsuse* was blown up in territorial waters. On the general issue, the views of American lawyers were declared in the *Times* to agree with those of Professor T. E. Holland. Mr. Moore, formerly of the State Department, and now Professor of International Law and Diplomacy at Columbia College, New York, while awaiting further evidence of Russian responsibility, or, as he said, "absolute proof," observed: "However, as these mines were deliberately floated into waters where they were liable to endanger neutral ships, the act is undoubtedly inadmissible." Dr. Theodore Woolsey, Professor of International Law at Yale University, observed: "My judgment would be that mines, whether anchored or intentionally set adrift in the straits of the Gulf

American jurists on laying mines in mid-ocean.

[1] Parliamentary Papers, "Accounts and Papers," 1864..62.

[2] *Times*, February 17, 1864.

of Pe-chi-li, beyond the coast sea-limit, constitute an indiscriminate attack upon neutrals and belligerents alike, and are, therefore, illegitimate." [1]

In the *Kreuz Zeitung*, the experience of the Germans in 1870, when several German mines which had been laid in German harbours were set adrift by storms, was appealed to as showing that the *Hatsuse* might have been struck by a mine that had been originally moored.[2]

Employment of balloons at battle of Liao-Yang.

The Japanese employed balloons at the great battle of Liao-Yang.[3] This was presumably only for purposes of observation, but this fact is not stated, though we are told that the Russians fired at one and missed it. Japan was a signatory of Declaration (1) of the Hague Peace Conference, and therefore undertook not to utilize balloons for dropping projectiles or explosives for a probationary period of five years from July, 1899; but she was, strictly speaking, not prohibited from so utilizing balloons at Liao-Yang in August, 1904. The incident did not lead to any Russian protest, and therefore it may be presumed that the Japanese balloon observed to the south-west of Liao-Yang was merely used for purposes of reconnaissance.

In present state of international law, projectiles may be thrown from balloons.

Great Britain was not a signatory of the Declaration (1) of the Hague Peace Conference. But as the probationary period has now expired, no Power is prohibited from utilizing balloons in the manner detailed. However, by order of the Czar, February 28, 1904, Russia regards the Hague declarations as still in force.

[1] *Times*, May, 26, 1904.

[2] It was stated in the *Times*, March 11, 1905, that the navigation of the Gulf of Pechili was attended with considerable danger owing to floating mines.

[3] *Times*, September 2, 1904.

PART III.

THE LAW GOVERNING STATES IN THE RELATION OF NEUTRALITY.

CHAPTER VII

THE PRINCIPLES OF NEUTRALITY AND SPECIAL USAGE PROHIBITING THE CONSTRUCTION AND OUTFIT OF VESSELS OF WAR.

Usage prohibiting construction of ships for belligerents not universally binding.

THE special usage, prohibiting the building and fitting out of ships for belligerents, abridging the common law privilege of neutrals cannot be said to be binding universally. It had its origin in the neutrality edicts of various minor Italian States promulged in 1779. The principal authority for the usage is undoubtedly the Treaty of Washington, 1871, but the principles there enunciated have failed to meet acceptance. Lampredi asserts "that Venice was the only example during the war of the American revolution of a neutral State absolutely prohibiting a traffic in contraband on its own territory, Naples only prohibiting the building for sale of vessels of war, and the exportation of other contraband articles, whilst Tuscany permitted her subjects to continue their accustomed trade in such articles, both within the territory and for exportation, subject, in the latter case, to the belligerent right of seizing contraband goods going for the enemy's use."[1]

Not an inference from views of First Armed Neutrality, 1780, as expressed by Lampredi and Azuni.

Lampredi establishes that international law does not require a nation to prohibit the sale of contraband articles within its own territory. The fact that Venice, within twenty years of her fall at the hands of Napoleon, should have imposed a degree of prohibition on her own trade, not required by international law, points the conclusion of Mr. W. E. Hall,

[1] Wheaton's "Law of Nations," p. 312, referred to in the arguments in the support of the rule *nisi* in *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 430, 470.

that "it is unwise for a people to enact or to retain neutrality laws more severe than it believes the measure of its duty to compel."[1] The fact and generalization are alike interesting in view of the fact that the shipbuilding sections of our own Foreign Enlistment Act, creating a crime and embarrassing an important branch of British industry, are greatly in excess of the requirements of international law.[2]

Venice alone acted on the rule prohibiting construction of vessels for belligerents.

It is also of interest to note historically that the usage of the Western Mediterranean, the source of maritime law on which the *Consolato del Mare*, the authoritative sea-code of the Middle Ages, was founded, was thus the origin of a modern international usage on which the Conference of Geneva sets its seal. Till the Declaration of Paris, 1856, Great Britain adhered to the rule laid down by *Il Consolato del Mare*, c. 273, that "the enemy's goods, found on board a friend's ship, shall be confiscated;" and it was Great Britain's uniform adherence to this principle which arrayed the Northern Powers against her. At a later date the converse has been seen. If this country had adopted the later usages of the Western Mediterranean, the *Alabama* affair would have been rendered impossible.

Galiani, advocate of First Armed Neutrality, in the domain of theory, introduced prohibition.

The first authority for the international usage prohibiting the construction and outfit of vessels was an Italian, Abbate Galiani, Sicilian Secretary of Legation at Paris, whose work on the reciprocal rights and duties of belligerents and neutrals was written *pro re nata* to defend the conduct of the King of Two Sicilies in adhering to the Russian League in 1782. There exists considerable doubt as to the merit of Galiani's work, it is spoken of by Phillimore in a manner that implies commendation,[3] but it was severely criticized by Historicus,[4] and the other advocate of the First Neutrality disputed its position, and the same may be said of Azuni.[5] Galiani made a naïve confession that his work was written under great pressure, at a time when he had no books to consult. This

[1] "International Law," 5th ed., p. 613.
[2] "Report of Neutrality Laws of Comm." pp. 9, 10.
[3] "International Law," vol. iii. p. 278.
[4] Letters, "International Law," p. 25.
[5] "Droit Maritime de L'Europe," 1805, cf. citation in "Letters of Historicus," p. 126.

circumstance, Historicus observed, may palliate the errors of Galiani, but hardly reinforces his authority.[1]

The United States, early in nineteenth century, upheld the prohibition of construction of vessels for belligerents.

Galiani, in fact, merely enunciated the principles of American neutrality as laid down by Story, C.J., in the *Santissima Trinidad*, (1822) Wheaton, 283, 340, and by the court in *The United States* v. *Quincy*, (1832) 6 Peter's Rep. 445, 466. Galiani said that "a ship built and armed for war in a neutral port cannot be there lawfully sold to a belligerent."[2] The Neutrality Act of the United States, 1818, which must be supposed to still embody the United States view of international duty, is consistent with the conclusion of Galiani, because under it the essence of offence consists in a fixed or present, and not a future or conditional, intention on the part of the neutral subject fitting out or arming the vessel. If he is knowingly concerned in fitting out the vessel he can be convicted, though that intent should appear to have been defeated after the vessel sailed. A defendant cannot be convicted under the Neutrality Act of the United States if he has no fixed intention to sell the vessel when she sailed.

Supreme Court of United States seem to concur with a continental jurist as to the existence of the prohibition.

The agreement between the view of Galiani and that of the court in *United States* v. *Quincy* is all the more remarkable because, as Historicus observed, continental views on maritime law differ from those of English or American publicist, as much as the views of "the Nominalists and Realists, the Thomists and the Dunses of the Middle Ages, or the Jansenists and the Jesuits of the last century."[3] The

[1] By a curious irony, in the Introduction to the "Letters of Historicus" (p. 10), we read that the author laboured under nearly the same disadvantage as Galiani. It appears that Manning, the author of the "Law of Nations," complained in 1839 that Schlegel's famous tract on Lord Stowell's judgment was not to be found in the Library of the Inner Temple. In an introduction issued several years after Historicus had ceased to contribute his brilliant letters, but before the Conference of Geneva, Historicus observed that, after thirty years, Manning's request was complied with, and Schlegel's tract reposed on the shelves of the Inner Temple. Historicus pronounced the Inner Temple Library to be absolutely useless, and complained bitterly of the absence of such well-known tracts as the *Pieces officielles* of Schoell, Ward's tract on Neutral Rights, 1801, and Lord Grenville's "Letters to Sulpicius." But in those days an eminent baron of the Exchequer pronounced international law to be "a necessarily vague science." *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 530.

[2] Wheaton, "History of International Law," p. 312.

[3] Letters on "International Law on the Territoriality of the Merchant Vessel," p. 202.

acute differences of opinion revealed at the debate at the Institute of International Law on the Naval Prize Code at Turin in 1882 prove the extent to which the differences prevail and remain. The Code was considered to represent the modern continental as opposed to the English and American view of prize law. While it was passed by a majority of the Institute, the English representatives opposed it in principle and in detail, while the American representatives simply abstained from attending the proceedings. It is therefore all the more remarkable that the views of the retained advocate of the First Armed Neutrality, on the subject of the sale of a ship by a neutral's subject *pendente bello*, are substantially in accord with decisions of the Supreme Court of the United States under the Neutrality Act. Both regard the sale of the ship on neutral territory as an infraction of neutrality when it is intended for the use of a belligerent. It is quite true that this construction was resented by both Pollock, C.B., and Bramwell, B., in *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 430, 528, *per* Pollock, C.B., and *per* Bramwell at p. 542.

Barons of the Exchequer, 1863, dissented from American view of usage.

Mr. W. E. Hall dissents.

Mr. W. E. Hall also rejects this construction, observing "that it must be permissible to give an order which it is permissible to execute."[1] But it is impossible to deny that this was the construction of neutral duties adopted by the Supreme Court of the United States.[2]

It is quite true that "it is generally unsafe to use municipal laws to define the view of international duty taken by a nation."[3] But it is no less true that the Neutrality Act of 1818 "must be supposed to embody what are to the United States international duties."

Sir R. Phillimore silent as to the existence of a usage prohibiting neutrals from constructing vessels for belligerents.

There is no trace of the rule making ships an exception to the general rule of contraband in Phillimore's "International Law," a work which seems to have been written, in part at least, before the conclusion of the Crimean War. Sir R. Phillimore treated ships as contraband when fitted for war and sent to a

[1] Hall's "International Law," 5th ed., p. 611.
[2] "Letters on International Law," by Historicus, p. 171.
[3] Hall, "International Law," 5th ed., p. 612 and note.

belligerent's port with orders to sell if possible.[1] But a sale under such circumstances is a mere transaction in contraband, as has been just seen, by the Neutrality Act of the United States, 1818. According to Phillimore, a ship of ambiguous use, having been previously employed for purposes of trade, with a destination to be sold under circumstances not indicating a hostile use of her, is not contraband. The distinction taken in Phillimore is clearly the rationale of the decision under the English Foreign Enlistment Act of 1819, which arose out of the events of the American Civil War. *The Attorney-General* v. *Sillem*, (1863) 2 H. & C. 430, decided that an unarmed vessel was contraband and nothing more, and therefore its sale under previous contract constituted no infringement of British neutrality, as interpreted by the Foreign Enlistment Act of that day.

According to the ground principle of neutrality, Mr. W. E. Hall considers a completely armed ship, in every respect fitted the moment it receives its crew to act as a man-of-war, to be a proper subject of commerce. But a special usage, substantially dating from the Conference of Geneva, is in course of growth.

Treaty of Washington, 1871, Art. 6, seems to have created exception.

In the celebrated reply of the English lawyers to the Prussian "Exposition des Motifs," issued in connection with the Silesian Loan, it was contended that the familiar aphorism, "the exception proves the rule," is instanced by the operation of treaties in maritime law.[2] This view supplies a complete explanation of the Treaty of Washington, 1871, made in connection with the inquiry at Geneva into the *Alabama* affair.

International practice on the subject.

In 1793 the United States prohibited the equipment of vessels in their ports which were of a nature solely adapted to war. This was followed by the Neutrality Act of 1818, making it penal to fit out and arm any ship or vessel with the intent that it should be employed in the service of a foreign State at war with a friendly State. The Foreign Enlistment Act, 1870, greatly exceeded the requirements of international law, and its provisions against ship-building therefore afford

[1] Phillimore's "International Law," vol. iii. s. 264, p. 360.
[2] "Collectanea Juridica," vol. i., piece v., p. 145.

no key to international usage. In France the State accommodates its rules to international law by making all persons exposing the State to reprisals, or to a declaration of war, liable to punishment under the Penal Code. It is interesting to note that this policy indemnified France against any such proceedings as were taken by the United States against this country in connection with the *Alabama* and her consorts. The French Government were able, under their Proclamation of Neutrality in 1861, to arrest six vessels which were in course of construction in French ports for the Confederate States. Italy adopted a like rule on the outbreak of the Danish War in 1864.

In 1866 the Government of the Netherlands, for the first time, undertook to see that the equipment of vessels of war intended for the belligerent parties should not take place in the ports of the Netherlands.[1] The codes of Austria, Spain, Portugal, and Denmark prohibit any one from procuring arms, vessels, or munitions of war for the service of a foreign Power.[2] Mr. W. E. Hall observes of these last codes that though the intention may have been to prevent the use of privateers, the language would, no doubt, restrain the construction of vessels for belligerent use.

Mr. W. E. Hall on the ground principles of neutrality as regards building ships for belligerents by neutrals.

As there was no universal or even partial adhesion to the principles of the Treaty of Washington, 1871, Mr. W. E. Hall considers that the exception it sought to establish is not binding. There is nothing, therefore, to prevent a ship of war (1) being built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; (2) being delivered to a belligerent within neutral territory, and issuing as belligerent property if—

(*a*) It is neither commissioned nor so manned as to be able to commit immediate hostilities;

(*b*) There is no good reason to believe that an intention exists of making the neutral territory a basis of operations.

[1] Note of M. Zuglen de Nyevelt to Mr. Ward, 1867. For this and the whole continental practice in the matter, see Neutral Laws Commission Report, Appendix iv., note. Hall's "International Law," p. 614.

[2] "Rev. de Droit International," vi. 502.

Prohibition an inchoate international usage.

On the other hand, it is evident that an international usage, operating by way of exception to the general rule that ships, even built and armed for war, are contraband and nothing more, is in course of growth. The Institute of International Law in 1875 sought to impose an obligation on neutral States to prevent persons other than its own agents from placing at the disposal of a belligerent State a ship of war in the neutral's ports or waters. On the one hand it must be remembered that a ship of war is "a most powerful instrument of mischief, of contraband ready made up in its most malignant form." [1] But this clearly constitutes a reason for introducing a ship of war as an exception to the general rule permitting the sale of contraband on neutral territory. Another reason also seems to exist in the tendency of wars to become more and more naval.

Reasons for growth of usage.

Mr. W. E. Hall's objection to intention of builder being regarded as foundation of doctrine.

Mr. W. E. Hall objects to the present indefinite form of the international usage, and considers it would be elucidated by planting the doctrine, not as now, upon the intention of the neutral trader or belligerent agent, but upon the character of the vessel. This would have the effect of excluding large mail steamers from the rule, which, as it is, clearly prohibits their construction and outfit in neutral ports. But the vessels whose operations gave birth to the international usage were vessels which experts were not able to distinguish as built for warlike use. Either the *Alexandra*, the *Florida*, or the *Alabama* might have been used as a yacht.[2] If the true interpretation of the usage is that it is confined to vessels built primarily for war, where are we to look for its origin? Nor can it be said, as can be urged on some other topics of contraband, that the interest of the origin of the international usage in question is purely historical. If there is one thing certain, it is that the commerce destroyer—and a large mail steamer when armed is the type of a commerce destroyer—is likely to play as prominent a part in the naval wars of the future as ever the *Alabama* and her consorts maintained.

[1] Phillimore's "International Law," vol. iii. s. 264, p. 360; Hall's "International Law," p. 615.

[2] *Attorney-General Sillem*, (1863) 2 H. & C. 430.

This is alike the view of Captain Mahan and of Sir H. S. Maine. On juridical principles, it is difficult to understand how the doctrine could be planted except in the intention of the belligerent agent or neutral trader. The international usage in question, like every other law, prohibits or restrains an act; and *actus non facit reum nisi mens sit rea.*

Alleged sales of vessels by Governments of neutral States to belligerents, Russo-Japanese War.

In the present war there have been repeated, if not confirmed, rumours as to the purchase of vessels by both belligerents from the subjects of neutral States in both hemispheres, and it would seem in one case even from the Government of a neutral State. In April, Japan was reported to be purchasing submarines in America.[1] There was some confirmation, which seemed circumstantial, of this report. In May the Government of the Tzar was said to have purchased the *Deutschland* and *Maria Theresa* from the North-German Lloyd Company. The Japanese about the same time were stated to have purchased the *St. Irene.* Later in the month, the Russian Government were alleged to have purchased the Hamburg-American liners, *Pretoria, Augusta Victoria,* and *Columbia.*[2] Some of this information was no doubt well founded. It was definitely stated in the *Times* several months afterwards that the Russian Government had acquired "the *Fürst Bismarck* and the *Columbia,* from the Hamburg American Steamship Company, and the *Kaiserin Maria Theresia* and the *Augusta Victoria* from the North-German Lloyd Steamship Company. These four ships have now been formally enrolled in the naval service of Russia. They have been re-christened respectively the *Don,* the *Terek,* the *Ural,* and the *Kuban* by the Russian naval authorities, and now rank officially as second-class cruisers. All four, according to Brassey's naval annual for 1904, were classed as merchant cruisers, auxiliary to the Imperial Government navy. Details of their armaments are given."[3] It was also contended by the *Times'* correspondent, with considerable plausibility and force, that the German Government must have been cognizant of, and have given its sanction to, the

[1] *Times,* April 25, 1904. [2] Ibid., May 12, 26, 28, 1904.
[3] Ibid., September 19, 1904.

transfer of such important vessels as these to the Russian Government. Assuming that the Imperial German Government took no part in the transfer, there was no infraction of neutrality in the transfer of the vessels to Russia. But if, on the other hand, the German Government was a party to the transfer to a belligerent of their own auxiliary cruisers, it is no less clear such a transaction is both opposed to authority and to recent international usage.[1]

Such sales do not raise the issue of the international usage, but are clear infractions of neutrality.

In Vattel's time (1758) the sale of ships had not become a branch of the law of foreign enlistment; but Vattel observes in the analogous case that if a neutral State furnishes troops to a belligerent, such assistance is incompatible with neutrality.

Ortolan says that if a neutral State engages in the carriage of products which have a direct connection with military operations, whether it does so for nothing or receives consideration for it, it becomes then an accessory in the struggle, and consequently commits an infraction of neutrality.[2]

Phillimore points out that Prussian and Russian ports are practically indistinguishable for purposes of contraband trade, and he attributes to this fact the prolongation of the Crimean War. Prussian subjects carried on a most lucrative trade in contraband with Russia during the Crimean War, and had it not been for the facilities they enjoyed for doing so, Phillimore conjectures that Prussia would have cast in her lot with the Allies in the Crimea. It is clear that Russia entertained some apprehensions of Prussia during the Crimea, since Prince Bismarck stated, in his last speech in the German Reichsrath, that Russia massed large forces in Eastern Europe along the German frontier during the Crimean War.[3]

Lucrative trade in contraband between Russia and Prussia in the Crimea.

At the close of the important statement made by the Prime Minister to the London Chamber of Commerce, reported in the *Times*, August 26, 1904, he observed—

Statement of Mr. A. J. Balfour, Aug. 26, seemed to have treated usage prohibiting neutrals from constructing vessels for belligerent use as inchoate.

"There can be no doubt that merchant ships may be sold by neutrals to any Government, and that that Government

[1] On March 15, 1905, Count Bülow definitively stated that the sale of German ships to Russian agents were legitimate transactions according to international law. See *Times*, March 16.

[2] "Règles Internationales," vol. ii. pp. 156–9.

[3] February, 1888, was the date of this speech.

may turn these ships into cruisers if they please. I believe that one of these vessels bought was a British ship."

This statement, Mr. Balfour added, was delivered on the authority of the law officers of the Crown. It is of the utmost importance to note that the opinion of the law officers was directed exclusively to the operation of international law on the facts. According to Mr. W. E. Hall, there is nothing in the ground principles of neutrality which prohibits the subject of a neutral State from selling a merchant vessel to a belligerent Government, since he may even sell an armed vessel built to the order of a belligerent without any infraction of neutrality. The principles enunciated by the Treaty of Washington, 1871, and the Conference of Geneva having failed to procure adhesion from other States, all the learning derived from those sources is irrelevant, and imposes no duties on neutral States.

But there cannot be a doubt that a British subject selling a merchant vessel to a belligerent Government which converts it into a cruiser commits an offence against the Foreign Enlistment Act, 1870, s. 8, if he has sold it having reasonable cause to believe that it will be employed in the naval service of a foreign State at war with a friendly State. It was suggested by a speaker at the London Chamber of Commerce, that the purchase of steamers by the Russian Government raised all the facts of the *Alabama* case. The answer of Mr. Balfour showed that in the opinion of the law officers of the Crown, following the reasoning of Mr. W. E. Hall, the *Alabama* case is not a precedent in the present state of international law, inasmuch as it only gave rise to an international usage which is in course of growth. The questions raised by the Foreign Enlistment Act, 1870, s. 8, are of a different kind.

Another rumoured purchase of the Russian Government is even less difficult to deal with. It was reported, and confirmed at a latter date, that the Russian Government had purchased from the Argentine Government four powerful armoured cruisers—*Garibaldi, General Belgrano, General San Martin, Pueyrredon*—all of 7,000 tons displacement, and

armed with Armstrong cannons.[1] The statement is made with reserve. But if true, it cannot be doubted, for the reasons already stated in connection with the purchase by Russia of German auxiliary cruisers during the present war, that such action is incompatible with neutrality.

[1] *Times*, May 26, 1904.

CHAPTER VIII.

BELLIGERENT OPERATIONS IN NEUTRAL WATERS AND THE CHEMULPHO AND CHIFU INCIDENTS.

Prohibition of infraction of neutral territory.

It is observed in Kent, "It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made, under neutral protection, the neutral is bound to redress the injury and effect restitution. . . . No use of neutral territory for the purpose of war can be permitted. . . . No act of hostility is to be commenced on neutral ground. . . . No measure is to be taken that will lead to immediate violence."[1]

Infraction of neutral territory gives no right of reclamation to private persons.

It seems necessary to distinguish between a public armed vessel and a merchant vessel belonging to a subject of a belligerent, in the case of a capture or destruction effected by a public vessel of the other belligerent within neutral waters. It is, on the one hand, undoubtedly true that no private person can rest a claim for the restoration of prize in the courts of the captor on the ground that the capture was made in neutral waters, and that the neutral nation whose rights have been infringed alone can interpose. The *Lilla*, 2 Sprague, 177; the *Sir William Peel*, 5 Wall, 517; the *Adela*, 6 Wall, 266; the *Anne*, 4 Wheat. 435; Wheat. Dana's note, 209.

View of Historicus.

Historicus, in his paper on belligerent violation of neutral rights,[2] lays it down that the right which is injured by the act of the offending belligerent is the right of the neutral Government, and not that of the belligerent, and therefore it is the neutral and not the belligerent who is strictly

[1] Kent's Commentaries, vol. i. p. 118.

[2] "International Law," p. 147, *et seq.*

entitled to claim or to enforce the remedy. This seems to be the law so far as regards a merchant vessel. But in the well-known case of the *General Armstrong*, an American privateer destroyed by British war vessels in a Portuguese harbour during the war of 1812, when the matter was submitted to arbitration nearly forty years afterwards, the injured belligerent State sought to claim compensation at the hands of the neutral State whose territorial rights had been infringed.

The matter was referred to Louis Napoleon, when President of the French Republic, and though he decided against the United States, who were the belligerent State, he seems to have considered that on principle a neutral State was liable to a belligerent State when it allowed the latter's enemy to destroy his vessel within neutral waters.

Incidents of the Russo-Japanese War.

Two incidents of this nature occurred during the Russo-Japanese War, one the destruction of the cruisers *Variag* and *Korietz*, off the Polynesian Islands on February 9, and the other the destruction of the Russian torpedo destroyer *Reshitelni*, in August, in Chifu harbour.

The battle of Chemulpho, Feb., 1904.

On February 8 Admiral Uriu, with six cruisers, two of whom were armoured, and eight torpedo boats, appeared off Chemulpho, on the north-west coast of Korea. At the time there were lying in the harbour three war vessels of other Powers, and two Russian war vessels. The Russian gunboat *Korietz* on this day had exchanged shots with the Japanese fleet off Round Island, and then returned to Chemulpho. Early on the morning of the 9th, Admiral Uriu notified Captain Roudinoff of the cruiser *Variag* that as hostilities existed between Russia and Japan—the rupture of diplomatic relations having taken place on February 6—unless he came out and engaged him before 4 p.m. he would be attacked at his anchorage. At the same time Admiral Uriu warned the commanders of the neutral vessels to take measures for the safety of their ships. The challenge sent by Admiral Uriu recalls that addressed by Captain Winslow of the Federal warship *Kearsage* to Captain Semmes of the *Alabama*, to come out of Cherbourg, June 21, 1864. Like Captain Semmes,

the captain of the *Variag* accepted the challenge to sally forth from the neutral harbour and with the like disastrous result.

The notification of Admiral Uriu to the commanders of the neutral war vessels gave rise to an incident of an unusual kind. This was a protest by the commanders against the violation of neutral territory involved by the Japanese attacking the Russian war vessels in the harbour.[1]

Whether one takes the view of Historicus, or of the editor of Kent's Commentaries, it is alike necessary to conclude that when a belligerent uses neutral territory for the purposes of war, there can generally only be two parties against whom a wrong is inflicted: (1) The neutral State whose territory is violated; (2) the other belligerent. No ordinary construction of neutral rights can render an act like that threatened by Admiral Uriu, indefensible as it may be, injurious to other neutral States, none of whom had any territory in those regions. But if so, it is difficult to see by what right the commanders of the public armed vessels of such States protested. Nor can it be said that, high-handed as the warning of Admiral Uriu may appear, he contemplated an ordinary infringement of neutral territory. In the same month Japan concluded an agreement with Korea, by which the latter is generally considered to have assumed the position of a mi-souverain State. The occurrence excited some animadversion in the Press at the time.

It is, however, not irrelevant to recall that England and France, early in 1902, entered at different dates into agreements guaranteeing the territorial integrity of Korea. Dr. T. J. Lawrence considers that this circumstance does not constitute

[1] The following is the text of the protest as taken from the *Times*:[2] "We consider that, in accordance with the recognized rules of international law, the port of Chemulpho being a neutral port, no country has the right to attack the vessels of another Power lying in that port, and that the Power which contravenes those laws is solely responsible for any loss of life or damage to property in such a port. We accordingly protest energetically against such a violation of neutrality and shall be happy to learn your decision on the subject.

"(Signed) "Lewis Bayley, Capt., *Talbot*.
"Borea, Capt., *Elba*.
"Sénès, Capt., *Pascal*."

[2] Cf. *Times*, April 18, 1904.

a vindication of the protest of the British and French commanders, since the independence of Korea is a nullity.[1] On this view it is difficult not to regard either the Anglo-Japanese convention or the Franco-Russian declaration as equally nullities. An agreement to guarantee that which does not exist cannot be regarded as serious. But even making full allowance for the fact that Korea is not a member of the family of nations, it is a little difficult to regard an independence guaranteed by the four Powers in 1902 as a nullity. Guarantees of independence seem destined to the same futility in the Far East as they have procured in Europe. In 1790 Prussia guaranteed the independence of Poland, though she played a leading part in its partition two years later.[2]

It is, perhaps, interesting to note that in the cases of the *Florida*, 1864, and *General Armstrong*, 1812, action was actually taken by a belligerent resembling that contemplated by Admiral Uriu. But in these cases the neutrals whose territorial integrity was infringed had not been guaranteed by other Powers a short time before the infraction occurred. In the case of the *Florida*, the United States surrendered the vessel and the men, and made an apology for the violation of territory, of which its officers had been guilty. It may be inferred from the decision of Louis Napoleon in the case of the *General Armstrong* that Korea might have escaped liability to Russia if Admiral Uriu had proceeded to carry out his expressed intention. In the former case, the neutral was excused for allowing its territorial integrity to be infringed because of the feebleness of its military resources on the spot. But this excuse is, on the facts, more open to Korea in 1904 than it was to Portugal in 1812.[3]

Protracted stay of Admiral Wirenius in vicinity of Djiboutil, Feb., 1904.

It was reported in the *Times*[4] that the Russian Admiral Wirenius, with a battleship, several cruisers, torpedo-boats, and destroyers, was at or in the vicinity of the French port of Djibutil, Somaliland, for part of the month of February,

[1] "War and Neutrality in the Far East," 2nd ed., p. 284.

[2] "Annual Register," 1795, p. 23.

[3] Cf. Kent's Commentaries, vol. i. pt. i., c. vi. p. 117, for an account of the case of the *General Armstrong*.

[4] February 23, 1904.

after the commencement of hostilities. The incident formed the subject of a question addressed by Mr. Lawson Walton, K.C., to the Prime Minister in the House of Commons.[1] In view of later events, it is arguable that Admiral Wirenius made a neutral port the base of his operations. It is also singular to note the inconsistency of the French observance of neutrality. While Admiral Wirenius, with a large squadron, was allowed to linger in the vicinity if not at the port of Djibutil, for at least ten days after the declaration of war, the Russian cruiser *Diana*, on taking refuge at Saigon after a sortie from Port Arthur, was peremptorily required to leave within twenty-four hours or be dismantled. This involves an unusual construction of a belligerent's right of asylum, a right which is essentially founded on the humanity of the neutral State. It cannot be supposed that it is the view of international law that the hospitality shown by the neutral State to a belligerent is unlimited in the case of a powerful squadron absolutely intact, but limited in the case of that a single cruiser flying from a victorious foe. As will be seen, the rule adopted in this war, that a defeated vessel must submit to dismantlement on taking refuge in a neutral harbour, was rejected by Mr. W. E. Hall as unwarrantable. It is difficult to admit, in view of the international relations of Japan and Korea, that there was anything more than a nominal infraction of neutrality by Admiral Uriu's squadron. It seems clear that there may have been infraction to this extent, as although the Russian cruisers were not defeated in Chemulpho harbour itself, they were defeated off Phalmi, an island four miles from Chemulpho, which presumably is a territorial unit of Korea.

The right of asylum.

A far more serious case of an act of hostility perpetrated on neutral ground was the cutting out of the Russian destroyer *Reshitelni* by the Japanese destroyers *Asashio* and *Kasumi* in Chifu harbour, after the desperate sortie of Admiral Witgeft's squadron from Port Arthur in the middle of August. The following is a *resumé* from Japanese sources: "On the night of August 10, while cruising in search of the scattered

The Chifu incident and the cutting out of the *Reshitelni*. Aug., 1904.

Japanese account of.

[1] June 7, 1904.

Russian ships, two destroyers, the *Asashio* and *Kasumi*, sighted one, apparently Russian destroyer, steaming westward at full speed, and immediately pursued her, but the latter disappeared in the darkness. Continuing this search till the next morning they found that the enemy's destroyer had entered Chifu. They remained outside territorial waters till night, in vain expecting her to come out. They then entered Chifu, and found that the enemy's destroyer was the *Reshitelni*. There was no sign of her being dismantled. Accordingly, Lieut. Terashima was sent to offer the Russian commander the alternative either to leave the port before dawn or surrender. The latter accepted neither, and while the discussion was proceeding, the Russian commander ordered his men to destroy the machinery and to fire. Then, suddenly taking Lieut. Terashima in his arms, he jumped overboard. Another Russian also jumped into the water with the Japanese interpreter. The other Russians commenced hostilities. Meanwhile, the magazines of the *Reshitelni* exploded, causing casualties among our men. Thereupon the *Reshitelni* was captured and towed out. The casualties were one killed and fourteen wounded."[1]

Russian account of.

The account furnished to the Tzar by Lieut. Rostachakovski, the commander of the *Reshitelni*, exhibits, as might be expected, some material variation from the Japanese account. Thus he represented that he lowered his flag and dismantled his vessel before the Japanese attacked him in the harbour. An account from Chifu, despatched from that place after the *Reshitelni* had entered it, but before she was attacked by the Japanese, stated that her commander had agreed, at the request of Admiral Sah, to render the engines absolutely useless and to disarm the vessel. But it was not alleged that Lieut. Rostachakovski had actually effected this.[2]

Lieut. Rostachakovski's account continues: "On the night of the 11–12th, I was in port when I was piratically attacked by the Japanese, who had approached with two torpedo boats and a cruiser, and sent a party under the command of an officer as though to enter into pourparlers. Not having arms

[1] Cf. *Times*, August 16, 1904. [2] Ibid., August 12.

to resist, I gave orders for preparation to be made to blow up the ship. When the Japanese began to hoist their flag, I insulted the Japanese officer by striking him and throwing him into the water. I then ordered the crew to throw the enemy into the sea. Our resistance, however, was unavailing, and the Japanese took possession of the boat. Explosions occurred in the engine-room and in the forepart of the vessel, but the *Reshitelni* did not sink, and was taken from the port by the Japanese."[1]

Admiral Alexeieff also represented to the Tzar that the *Reshitelni* was dismantled before the Japanese attacked her. The fact is important in another connection, but can hardly be considered relevant to the merits of the question of infringement of Chinese neutrality by Japan. Even if the *Reshitelni* was not in fact disarmed when attacked by the Japanese, her captain had agreed to disarm. Again, supposing that the neglect to disarm the *Reshitelni* was wilful, it only proves that her commander also was infringing Chinese neutrality. But a neutral State cannot call upon one belligerent to protect her neutrality against his enemy. Nor does this dispose of the matter. It was stated in the *Times* that while the Chinese fully recognized that Japan had committed an infraction of neutrality, she considered that Japan was morally exonerated by the constant violations of the neutrality of Chinese neutral territory between the Great Wall and the Liau River by Russia, and by the latter Power's disregard of the neutrality of the treaty-port of Niu-Chang.[2] It is also curious to note that the torpedoing of the British steamer *Hipsang* by the Russians was considered as some excuse for the Japanese destruction of the *Reshitelni*. It cannot be said, it is submitted, that, from the point of view of international law, these arguments are void of force. The definition of a neutral is *in bello medius*; and if in fact one belligerent, by consent or otherwise, is constantly deriving military advantages by infractions of neutrality, his enemy is not bound to acquiesce indefinitely in such a state of affairs. Professor T. E. Holland has pointed out that the Chinese have not yet

[1] *Times*, August 15, 1904. [2] August 7, 1904.

attained to a respect for the laws of war, and it appears from her action during the present Russo-Japanese War that China has not even a rudimentary conception of the somewhat exacting obligations of the modern neutral State, as expounded by Historicus or Hall. It is justly questioned by Wheaton's editors how far China has entered into the pale of public law.[1]

It seems, at least, possible to take the view that Russia's right in Manchuria is to be explained as a right of continued passage, derived from the Trans-Siberian Railway Treaty of 1896. This treaty conferred on Russia a right, not merely to construct a railway, but also to station troops for its protection. On this view Russia has, perhaps, a prior right to station troops in Manchuria. Vattel observes that "the infinite evils" of a neutral country becoming a theatre of war "are an unexceptionable reason for refusing the passage."[2]

The case is stronger against Japan, after her landing in Manchuria in May, 1904. Japan has thus forced a passage, and attacked an enemy in a neutral country. Vattel observes, "He who attempts to force a passage does an injury to the neutral nation, and gives her most just cause to unite her arms with those of his adversary." It is unlawful, he adds, to attack an enemy in a neutral country. If the view taken by Kent's editor is the correct one, and the party who is entitled to claim and enforce a remedy for an infraction of neutrality is the injured belligerent, it is only possible to conclude that this war will leave in its wake a great number of important questions outstanding, which will have to be ultimately settled by arbitration before the Hague Court or otherwise. If the precedent of the *General Armstrong* be followed, both belligerents in this war seem committed to a course of litigation, more or less fruitless, with China for permitting infractions of her neutrality.

The only conceivable excuse for China is her weakness, though it may be questioned whether this excuse avails. In a case in which international law bearing on neutral duties

[1] Wheaton's "International Laws," ed. 1904, p. 22.

[2] "Droit des Gens," l. iii. c. vii. s. 129.

was much discussed,[1] Lord Selborne (then Sir W. Roundell Palmer, A.G.), in his argument, argued that a powerful belligerent would necessarily exact a higher standard of neutrality from a weak neutral than if the balance of power was reversed. But in the present war, assuming, as it is clearly necessary to assume, the weakness of China, the reverse has happened. Two powerful belligerents have repeatedly condoned infractions of neutrality by a weak neutral which would have meant war if perpetrated or suffered by a strong neutral like England or Germany. As regards the *Reshitelni* affair, it is clear that one of the excuses which availed Portugal in the *General Armstrong* affair cannot be pleaded in justification of China. In that case the President of he French Republic held (*inter alia*) that Portugal was not liable because the garrison was feeble, and the American commander did not apply in the proper time for protection. But China had, in the case under discussion, a commodore and a naval force in Chifu which was amply adequate to afford protection against two torpedo destroyers, and the Russian commander had previously applied for protection. The epigram of Catherine of Russia on the Armed Neutrality, *nullité armée*, applies to the neutrality of China at the present day. A neutrality which permits its territories to be used for purposes of war by both belligerents, and its waters by the victorious belligerent can only be described as a nullity, whether armed or not. A final comment on the *Reshitelni* incident is that it shows that, as far as the observance of neutral duties is concerned, the equality of States, "always a fiction, promises to become an absurdity." [2]

The reply of the Japanese Government to strictures on the *Reshitelni* incident was, it must be admitted, the best possible defence that could have been made under the circumstances. It commenced by observing, "The status of China in the present struggle is quite unique. Nearly all the military operations are carried on within her borders, but she is not a party to the conflict. Nevertheless, her territories

[1] *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 511.

[2] Article by Sir J. Macdonnell, *Nineteenth Century*, July, 1904.

The neutrality of China "an anomaly and a contradiction."

are in part belligerent and in part neutral. That condition of things is, as regards international law, an anomaly and a contradiction." It proceeds to contend that China's neutrality is imperfect, and applicable only to those places which are not occupied by the armed forces of either belligerent, and that Russia cannot escape the consequences of an unsuccessful war by moving her army or navy into those portions of China which have by arrangement been made conditionally neutral. With the termination of the *Reshitelni* incident the neutrality of the port of Chifu was revived. The statement then continues that the Russian gunboat *Mandjur* remained for weeks at Shanghai after being requested to leave, and that the same was in a limited sense true of the cruiser *Askold* and the destroyer *Gromoboi*. The case of the *Reshitelni* is then distinguished from that of the *Florida*. During the American Civil War the neutrality of Brazil was perfect and unconditional, and the port of Bahia was a long distance from the seat of war, whereas the neutrality of China is imperfect and conditional, and the port of Chifu is in close proximity to the zone of military operations. The statement proceeds to compare the case of the *Reshitelni* to the case of the British ship *Queen Anne*, and the American privateer *General Armstrong*, when the injured belligerent unsuccessfully sought compensation because he had been the aggressor.[1]

It may be at once admitted that the status of China in the present struggle is unique. The only hypothesis which could reconcile the attitude of Russia in Manchuria with the laws of war is that she is the ally of China, who is also belligerent. During the Great War at the close of the eighteenth and commencement of the nineteenth centuries, Russia maintained large armies at a distance of thousands of miles from her frontiers, fighting the French with allies in Italy and Germany. But as Russia is now conducting military operations on a vast scale in Chinese territory, neither as the ally nor enemy of China, the situation must be considered unique. The maxim of Grotius, "Distinguendus erit belli status," is more applicable now than it has ever been in the course of history.

[1] *Times*, August 17, 1904.

In the domain of theory, and even of practice, the contention of Japan that there is such a thing as an imperfect neutrality is untenable. The Counter Declaration of the Court of Denmark in 1793, "one of the most admirable state papers, and one of the soundest expositions of the general principles of International Law which any age or country can boast,"[1] contained these memorable words, "Where a neutrality is not quite perfect, it ceases to be neutrality."[2] Since they were written, the standard of duty has been raised by the events of the American Civil War. Other portions of the Japanese statement implicitly deny the belligerent right of asylum. But authority and precedent are entirely to the contrary. It has always been assumed to be a feature common to the law of either land or maritime belligerency. The Prussians did not follow the army of General Clinchant into Switzerland in 1871; and the *Tuscarora* did not attempt to cut out the *Nashville* at Southampton in 1861. The only possible construction of the somewhat naïve statement that the neutrality of the port of Chifu "revived" after the *Reshitelni* incident is that it must have been previously infringed by Japan, and therefore *cadit quæstio*.

There cannot be an "imperfect neutrality."

How little there is in the Japanese objection that the *Mandjur*, *Gromoboi*, and *Askold* remained a long time in Shanghai without being dismantled, can be best inferred from the express statement of Mr. Hall, that there is nothing in principle which requires a belligerent vessel to be disarmed when she takes refuge after defeat in a neutral harbour.

It is purely a question of port regulations. But a belligerent cannot demand that a neutral shall adopt port regulations to suit the exigencies of a maritime campaign. It is, further, mere refinement to insist that the Russians were the aggressors in the *Reshitelni* incident, because the Russians offered resistance after the Japanese had boarded their vessel. So far as the *Reshitelni* incident is a question between the belligerents it is difficult, on any construction of the case of the *General Armstrong*, to defend the action of Japan, which was clearly the

[1] Phillimore's "International Law," vol. iii. pp. 338, 339.
[2] Ibid., *supra*, p. 343.

aggressor. That case, further, seems no less clearly to show that China has incurred some liability to Russia. If anything is certain in the matter it is that the Russian commander had previously applied to the Chinese commodore for protection. But this circumstance decisively distinguishes the *Reshitelni* incident from the case of the *General Armstrong*, where the neutral was held not liable. As an instance of faithful compliance with neutral duty, the action of the French at Martinique in 1862 may be contrasted. The famous *Alabama* having put in, she was followed shortly afterwards by the Federal warship *San Jacinto*. But the commander of a French warship in the harbour took up a station between the two vessels, and thus prevented any incident like the cutting out of the *Florida* by the *Wachussett* in 1864 being attempted.

CHAPTER IX.

RECEPTION OF BELLIGERENT CRUISERS IN NEUTRAL PORTS.

Absence of express prohibition, semble, implied permission by neutral.

In the absence of positive prohibition, a belligerent cruiser was not only entitled to seek an asylum and hospitality in neutral ports, but also to bring in and sell her prizes within those ports.[1] Loccenius (1651) considered that a State could not lawfully exclude the prizes of a belligerent without previous treaty stipulations to that effect.[2] But Loccenius, like Bynkershoek, was a great advocate of belligerency, and international law for a century and a quarter has shown a distinct tendency to minimise the duties of neutrals. The reception of belligerent cruisers in neutral ports is naturally a branch of law which reflects this tendency. Sir R. Phillimore even considered that no uniformity of practice has prevailed upon the subject of permitting prizes to be brought into neutral ports. He says, "The matter has been governed (1) by domestic regulations, and sometimes (2) by treaties. In the absence of such provisions, it should seem that the presumption is in favour of the permission. It is a *prima facie* presumption, however, only, and capable of being easily rebutted."[3] Mr. W. E. Hall points out that Phillimore (*supra*) seems to look upon a treaty made before outbreak of war as needed to make the reception of prizes a strictly legitimate act.[4] It would follow from this that the law has entirely changed since the date of Loccenius, and Mr. W. E.

Limitation of above rule, due to modern tendency to restrict neutral obligation.

[1] Bynkershoek, "Quæst. Jur. Pub." lib. i. c. 15. Vattel, liv. iii. c. 7. s. 132. Valin, "Comm. sur l'Ordonn. de la Marine," tom. ii. p. 272.

[2] "De Jure Maritimo," l. i. c. iv. s. 7.

[3] Phillimore's "International Law," vol. iii. s. 363.

[4] Hall's "International Law," p. 619.

Hall admits that it is in the course of being changed. It is equally clear that he approves of the tendency of the change in the direction of exclusion which has been developing since the seventeenth century, insomuch as he contends that a belligerent cruiser who is allowed to bring in his prizes into a neutral port continues an act of war, and is thus allowed to bring in property which does not belong to him.

Treaties on the subject.

The history of the subject is as follows. In 1742 a treaty was made between Spain and Denmark authorizing the reception and sale of prizes reciprocally. In 1778 a treaty was entered into between France and the United States whereby no ship of the enemy of either party was allowed to sell her prize or discharge her cargo, or buy more provisions than were immediately indispensable, in the ports of the other. In 1782 a treaty was entered into between the United States and Holland, then one of the principal maritime Powers, whereby the sale of prizes brought by either party into the ports of the other was legalized. In 1794 a treaty of exclusion was made between England and the United States. In 1800 France and the United States entered into a treaty of exclusion similar to that of 1778. At the treaty of Ghent, after the war between Great Britain and the United States in 1812, the stipulations of the treaty of 1794, providing for the exclusion of prizes captured by the enemies of either State from the ports of the other, were not renewed. The Confederates, therefore, during the Civil War, contended that Great Britain was under no treaty obligation to exclude their prizes. But as the subject is one which may be provided for by the domestic regulations of a State, it seems that it was competent for the British Government to issue the Orders in Council of 1861, excluding the prizes of either party from British ports and territorial waters.

Regulations of neutral States

In 1826 all belligerents were prohibited from bringing (except in cases of distress) any prize, or any part of the cargo of prizes, into Gibraltar, or from making that port a rendezvous for any warlike purposes. A belligerent within a neutral port was forbidden to give notice by signals or guns to her consorts outside of the movements of an enemy.

In 1854 Spain prohibited the fitting out or admission into Spanish ports of privateers under the Russian flag.

During the American Civil War a captor who brought his prize into British waters was required to depart and remove such prizes immediately. A vessel *bonâ fide* converted into a ship of war was, however, not to be deemed a prize. In case of stress of weather, or other extreme and unavoidable necessity, the necessary time for removing the prize was to be allowed. If the prize was not removed by the prescribed time, or if the capture was made in violation of British jurisdiction, the prize was to be detained until her Majesty's pleasure should be made known. Cargoes were to be subject to the same rule as prizes.[1] A subsequent order provided that no ship of war of either belligerent should be allowed to remain in a British port for the purpose of being dismantled or sold.

The hostilities between France and China in 1884–5 were conducted without any formal declaration of war. Complaints were made in Parliament that, although the French operations were chiefly injurious to British merchants, cotton having been declared contraband, the French warships were suffered to use Hong-Kong as practically their base of operations. This circumstance recalls the reproaches addressed to the British Government by that of the United States regarding the *Shenandoah* at Melbourne in 1865. The *Alabama* undoubtedly destroyed, in some cases, British ships and British cargoes. Early in 1885, however, Great Britain decided to regard the French notification of the blockade of Formosa as equivalent to a declaration of war. Permission to refit was, consequently, denied to the *Triomphante* when she arrived at Hong-Kong; but she was allowed, as were other ships in like circumstances, to take on board sufficient coal to carry her to the nearest French port, Saigon.[2]

During the Franco-German War of 1870–1, armed ships of either belligerent were interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the

[1] Circular to Governors of Colonies, June 2, 1864.

[2] *Times*, December 29, 1884; "Annual Register," 1885, p. 331. And see an article in the "Revue de Droit International for 1903," p. 488, by M. Sakuye Takahashi, "Hostilités entre la France et la Chine."

United Kingdom, or any of her Majesty's colonies or possessions abroad.[1] But the case of the *Gauntlet*, (1872) L. R. 4 P. C. 184, shows that the exclusion of 1870, like that of 1861, was subject to exception when a prize was driven into a British port by stress of weather. In that case a Prussian ship captured in the English Channel by a French ship of war was driven by stress of weather into the Downs, anchored within British waters, and lay there two days. Both in 1898 and 1904[2] armed ships of a belligerent were interdicted from carrying prizes made by them into ports, harbours, roadsteads, or waters of the United Kingdom, or any of her Majesty's colonies or possessions abroad.

While the American Civil War lasted France prohibited all ships of war or privateers of either part from remaining in her ports with prizes for more than twenty-four hours, except in case of imminent perils of the sea. No prize goods were permitted to be sold in French territory.[3] The prohibition by France as regards privateers during the American Civil War seems to have been supererogatory, as neither the Federals nor the Confederates issued letters of marque. Neither Belgium, Holland, nor Prussia issued any regulations during the American Civil War on the subject of excluding the prizes of either belligerent. In the subsequent wars between Brazil and Paraguay, and Spain and Chili, Holland prohibited ships of war or privateers, with prizes, from entering or refitting in her harbours, unless overtaken by evident necessity. In the present war, the subject of admitting the prizes of belligerents into neutral ports has not required consideration, partly owing to geographical conditions, and partly because, by the action of the neutrals, the presumption of admission has been rebutted. Indirectly the subject possesses considerable interest in future war, since "the growing indisposition of neutrals to admit prizes within the shelter of their waters, together with the wide range of modern

[1] Lord Granville to Admiralty, *London Gazette*, July 19, 1870. Hertslet, "Commercial Treaties," xxi. p. 834.

[2] Lord Lansdowne to Admiralty, *London Gazette*, February 10, 1904.

[3] "Ref. Neutrality Laws Comm.," 1868, p. 69.

commerce," will have the probable effect of inducing belligerents to insist upon their full rights, and destroy their prizes.[1] It is curious to note that though Mr. W. E. Hall seemed to consider that the destruction of prizes was a probable consequence of exclusion, he nevertheless expressed an ardent wish that exclusion might come to be regarded as a neutral duty.[2] On the other hand, he considered that the somewhat analogous rule in course of growth limiting the stay of a belligerent cruiser in a neutral port could never become a rule of international law, on the grounds that it was a mere port regulation, and that a neutral can never be deprived of the right to vary his own port regulations. The distinction is probably due to the consideration that the admission of a cruiser with her prize into the neutral port, as it may be the continuance of an act of war, constitutes an injury to the other belligerent, while the mere admission of the cruiser without her prize does not constitute an injury to the other belligerent.

Distinction between limiting the stay of cruiser with prize or without prize.

Urgent topic of Russo-Japanese War as to stay of cruiser without prize.

The reception of belligerent cruisers in neutral ports without prizes is a topic that has been keenly agitated in connection with the events of the Russo-Japanese War. The facts will be fully noticed later. The general principle used to be laid down that as long as the neutral supplies both parties equally, neither has any right to complain. It is not a rule of international law that the supplies purchased by a belligerent cruiser in a neutral port should be limited to any particular quantity. This was the state of the law in 1861, in the outbreak of the American Civil War.[3] But in 1861 the use of steam had by no means entirely supplanted the use of sails as a means of propulsion. The *Alabama* herself, by far the fastest war vessel afloat at the time, though fitted with engines, relied almost exclusively on her sailing powers. In his "Memoirs of Service Afloat," c. xxxii. p. 419, Captain Semmes observes, "I was much gratified to find that my new ship proved to be a fine sailer under canvas. This quality was of inestimable advantage to me, as it enabled

[1] Hall's "International Law," p. 459. [2] Mr. Lea, p. 619.

[3] British counter case at Geneva. Parliamentary Papers. North America, 1872 (No. 4), p. 13. Ortolan, "Diplomatic de la Mer," tom. ii. p. 283.

me to do most of my work under sail. . . . I adopted the plan, therefore, of working under sail in the very beginning of my cruise, and practised it to the end. With the exception of half a dozen prizes, all my captures were made with my screw hoisted, and my ship under sail, with but one exception, I never had occasion to use steam to escape from an enemy."[1]

Importance of coal to modern warship changes the question.

The importance of a neutral port as a coaling station at the present day cannot be exaggerated, but it is equally true that this is a modern feature of maritime warfare. The conditions of modern warfare are not susceptible of adequate consideration under the principle that obtained before the American Civil War, that there was no compulsory restriction on the reception of a belligerent cruiser in neutral ports. When steam is practically the sole means of propulsion, coal is as obviously a necessity to a cruiser as gunpowder and provisions always were and are. Again, since steam has rendered the duration of voyages approximately determinable beforehand, it is only consistent that the supply of provisions meted out to a belligerent cruiser in a neutral port should be equally limited. When a vessel was more or less completely at the mercy of the winds and waves, there was not the same reasonableness in limiting the store of provisions a belligerent vessel might purchase in a neutral port, simply because it was far less possible to state definitely the duration of its voyage to the nearest port in its territory. Further, the political and territorial conditions prevalent between those nations, such as England, France, and Spain, which carried on naval operations in distant regions, suggest that these Powers did not avail themselves of the entire absence of restrictions which then existed as to the reception of a belligerent vessel in neutral ports. All the above countries were then provided with colonies in distant regions.

[1] It is observed by Wheaton's editors that the depredations of the *Alabama* were mainly possible because, for one reason, British coaling stations all over the world were open to her for coaling. There can be no doubt British (and foreign) ports were open to the *Alabama* for coaling. But, from the above explicit statement of Captain Semmes, this fact had little or nothing to do with the success of her depredations. Again, when she sailed for the China Seas in 1863, coals were engaged in advance for the *Alabama*, not at any British port, but at Madagascar.

It was pointed out by Captain Semmes, in a remarkable letter addressed to the *Times* (June 16, 1864), that belligerents do not, other things being equal, favour the carrying of their prizes into neutral ports because it is desirable, from their point of view, that the prize court should have the actual custody of the prize; and there is more opportunity of dealing with prize property, which may be bought in by the Government, if the prize is carried into a native port of the belligerent. Mr. Hall observes on this point: "If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores which, though not warlike, are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia, in a war with France, would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable."[1] It was a frequent comment in Federal quarters that the *Alabama* never visited a Confederate port, and this was one of the reasons commonly assigned by the Federals at the time for regarding her as a pirate. The parallel between Mr. Hall's hypothesis and the current events of the Russo-Japanese War, recalls the presage of Sir H. S. Maine, made, it is curious to note, about the same time, that there would be "a struggle to include coal and provisions as contraband."[2] The topic of the reception of belligerent vessels in neutral ports is connected with the general principle that a belligerent may not make neutral territory the basis of his operations, and that all use of the neutral territory for hostile purposes is prohibited. In 1865 the *Shenandoah*, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her

Opinion of Mr. W. E. Hall that licence to a belligerent to coal amounts to a right of continued passage over territory.

Case of the *Shenandoah* 1865.

[1] Hall's "International Law," part iv. c. iii. p. 605.
[2] Lectures, "International Law," vi. p. 114.

to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States, her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the Government of that country that the main operation of the naval warfare of the *Shenendoah* having been accomplished by means of the coaling and other refitment, Melbourne had been converted into her base of operations. The argument was unsound, because continued use is, above all things, the crucial test for the purpose of affecting a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory.[1] There is no rule of international law limiting the supplies purchased by a belligerent cruiser in a neutral port to any particular quantity. There are no treaties on the subject. But on the outbreak of a maritime war, neutral ports generally make some rules on this topic. It is a violation of the essential principles of neutrality for a State to permit more supplies to be obtained than can reasonably be considered necessary for reaching a place of safety.

Mr. W. E. Hall's opinion, Not a case of continued user.

"There can be little doubt," Mr. Hall observes, "that no neutral State would now venture to fall below this measure of care; and there can be little doubt that this conduct will be as right as it will be prudent."[2]

It seems implicit that neutral regulations limiting supplies, unlike regulations limiting the stay of a belligerent vessel in a neutral port, are not mere municipal regulations, but are an enforcement of international law. Sir Alexander Cockburn, in his Reasons for not signing the Geneva Award, observed that the hypothesis of pre-existence is essential to the very conception of legal obligation. The exclusion of

[1] Hall's "International Law," part iv. c. iii. p. 605.
[2] Ibid., p. 606.

prizes from neutral ports is a mere enforcement of pre-existing international law, but municipal neutral regulations limiting the stay of a vessel in a neutral port can never give rise to a rule of international law, since they do not reflect any principle of pre-existing neutral obligations, but are based exclusively on the territoriality of sovereignty.

Treaties may operate either as an exception to some principle of international law, like the article declaring "free ships, free goods" in the Declaration of Paris, or they may be declaratory of international law.

But a treaty may be concerned only with a topic of municipal regulation since the object of a treaty may be commercial. Treaties limiting the departure of a belligerent cruiser from a neutral port to twenty-four hours after the sailing of the vessel of another belligerent were concluded with the Barbary States in the seventeenth century.[1] Such treaties, since practically they are mutual port regulations, may be compared to a Customs Union. But the rule limiting the supply of coal or provisions a belligerent cruiser may obtain in a neutral port, has never been provided by treaty. As has been seen, coal was not really an imperative necessity so late as the American War, and hence probably the fact that its supply has not been regulated by treaty. The machinery adopted in this country for these purposes is his Majesty's Orders in Council. During the American Civil War, England prohibited all ships of war and privateers of either party from using any port or waters subject to British jurisdiction, as a station or place of resort for any warlike purpose, or for obtaining any facilities of warlike equipment; and no vessel of war or privateer of one belligerent was to be permitted to leave any British port, from which any vessel of the other belligerent (whether a ship of war or a merchant vessel) should have previously departed, until twenty-four hours after the departure of the latter. In its original form this regulation only applied to privateers, and a commander of a vessel of war was only required to give his word that he would not commit hostilities

Rule limiting supplies of belligerent ships in neutral ports never regulated by treaty.

Universal operation of 24 hours' rule.

[1] Bernard's "Historical Account of the Neutrality of Great Britain," p. 273.

against any vessel issuing from a neutral port shortly before him. Privateers were not infrequently entirely excluded from resorting to a neutral port, save in cases of danger from the sea or absolute necessity. Italy, France, England, the United States, and Holland have long since adopted the rule. Mr. Hall speaks of it as a regulation which is practically sure to be enforced in every war.[1] The history of the subject shows that so long ago as 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should only be followed by the other after an interval of twenty-four hours.[2] In 1778 the Grand Duke of Tuscany forbade both ships of war and privateers to go out for twenty-four hours after a ship, whether enemy or neutral (*di qualsivoglia bandiera*). At this date the rule "free ships, free goods" did not obtain, but the goods of an enemy, on board the ships of a friend, were lawful prize, hence the latter restriction.[3] The Genoese rule was the same; Venice was contented with the promises of the neutral commander that he would not molest an enemy or neutral for twenty-four hours, but she retained privateers for that time in port.[4] The Austrian proclamation of neutrality of 1803 ordered vessels not to hover outside the Austrian ports, nor to follow their enemies out of them; it also imposed the twenty-four hours rule on privateers, and in the case of ships of war required the word of the captain. The distinction seems to be similar in principle to that distinction between the sale of contraband on neutral territory, and its conveyance to a belligerent, which was discussed by Historicus. The sale of contraband on neutral territory is a question of municipal, not of international law, and can be restrained under the Customs Consolidation Act, when it would fall under the operation of port regulations.

The origin of the issue of the Order in Council of January, 1862, was the blockade of the Confederate cruiser *Nashville* in Southampton by the Federal *Tuscarora*. The *Tuscarora* took

[1] "International Law," p. 628.
[2] Ortolan, "Diplomatie de la Mer," ii. 257.
[3] De Martens, Rec. iii. 25.
[4] Ibid., 80.

up a position outside the harbour, thereby preventing the *Nashville* from landing. The *Tuscarora* always kept up steam, and thus was able to precede the other ship whenever she attempted to leave. The *Tuscarora* having left, the *Nashville* could not leave for twenty-four hours; before the close of twenty-four hours the *Tuscarora* would return to her anchorage. Repeating this operation, she effectually prevented the *Nashville* from leaving.[1] By this Order in Council nothing but provisions requisite for the subsistence of the crew, and so much coal as would carry the ship to the nearest port of the country, or to some nearer destination, was to be supplied to ships of war or privateers; the coal was only to be supplied once in three months to the same ship, unless this was relaxed by special permission.[2] Similar rules were put in force during the Franco-German War, 1870–1;[3] in the Spanish-American War of 1898; and in the Russo-Japanese War of 1904. The rule in this latter case limited the supply of coal to "so much as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named neutral destination."[4] Holland, during the wars between Brazil and Paraguay, and Spain and Chili, prohibited ships of both parties, being in a Dutch harbour at the same time, from departing until twenty-four hours after the other. Japan adopted what is practically the British twenty-four-hours' rule as far back as 1870.[5]

Rules adopted by Great Britain during Russo-Japanese War, 1904.

Negrin on the admission of belligerent vessels into neutral ports.

"Negrin (p. 180)," says Mr. W. E. Hall, "well sums up as follows the condition upon which belligerent vessels are now admitted into neutral ports:—

"Las condiciones," he says, "del asilo respecto de los beligerantes son:—

"1. Observar la mejor armonía y una paz completo en el puerto, aún con los mismos enemigos.

"2. No reclutar gente para aumentar ó completar las tripulaciones.

[1] Cf. Halleck, vol. ii. p. 165, and note.
[2] Earl Russell to the Admiralty, *London Gazette*, December 15, 1863.
[3] Lord Granville to Admiralty, *London Gazette*, July 19, 1870.
[4] *London Gazette*, February 11, 1904.
[5] M. Sakuyé Takahashi in the "Revue de Droit International," 1901. p. 264.

"3. No aumentar el calibre de la artilleria, ni embarcar armas y municiones de guerra en buques militaires y corsarios.

"4. No hacer uso del asilo para vigilar los buques enemigos ni obtener noticias sobre sus futuros moviementos.

"5. No abandonar el puerto hasta veintecuatro horas despues de haberlo hecho la escuadra ó buque enemigo, mercante ó de guerra que en el se hallaba.

"6. No intentar apoderarse, ya sea por la fuerza ó por la astucia de las presas que pueda haber en el puerto.

"7. No proceder á las venta de las que se conduzcan al mismo, miéntras no hayan sido declaradas legitimas por el tribunal competente."

The events of the Russo-Japanese War which merit attention in connection with the topic of the reception of belligerent cruisers in neutral ports are the Declaration of the Governor of Malta, and the dismantlement of the armaments, and internment of the crews, of Russian war-vessels in the territorial waters of neutral Powers.

Declaration of Governor of Malta, Aug., 1904.

The effect of the proclamation is that belligerent vessels proceeding to the seat of war, or to any positions on the line of route with the object of intercepting neutral vessels conveying contraband, are entirely prohibited from making use of British territorial waters for the purpose of coaling. It makes no difference whether the vessels present themselves assembled together or singly, nor whether the coaling is sought to be effected from the shore or from colliers. The proclamation is not to apply to vessels in distress, and it is understood that similar instructions have been sent to the Governors of the Colonies.[1] Few writers on international law could be cited as having anticipated with such precision the working out of the principle as Mr. W. E. Hall on the point under consideration. He contended that as it constituted a violation of the essential principles of neutrality to mete out more supplies to a belligerent cruiser in a neutral port than could reasonably be considered necessary for reaching a place of safety, nations would adopt the right and prudent conduct of not falling

[1] *Times*, August 23, 1904.

below the standard of care which they adopted in recent wars.

Case of the *Mandjur*.

The first case of dismantling was that of the gunboat *Mandjur*. This vessel arrived at Shanghai about February 15, and on March 31 its disarmament was satisfactorily verified by the Japanese Consul-General, M. Odagiri. Not only was the vessel disarmed, but important parts of the machinery were removed.

Internment of Russian warships after battle in German, Chinese, and French ports.

On August 10, 1904, a great naval battle took place between Admiral Togo's squadron and the Russian squadron from Port Arthur under Admiral Vitoft, who was killed. According to Admiral Togo's reports, five of the six Russian battleships were seriously damaged. The Japanese had a slight superiority in battleships, seven to six, and a great superiority in cruisers. As a result, the Russian destroyer *Grosovoi* and cruiser *Askold* were driven to take refuge in Shanghai, the *Diana* was driven to Saigon, and the Russian flagship, the *Tsarevitch*, the cruiser *Novik*, and some Russian destroyers were forced to take refuge in Kiao-Chau.[1] All the ammunition in the four Russian war vessels was removed and stored in the German magazines, and the guns were completely dismantled. The terms of parole obliged the Russians to remain at Tsingtau till the end of the war. The crews of the Russian ships which fled for refuge, numbering approximately 1000 officers and men, were to remain at Tsingtau till the end of the war.[2] On August 29 it was announced in the *Times* that the *Askold* and *Grosovoi* had been dismantled at Shanghai. The precedent of Tsingtau was followed in all respects, the crew being interned in a specific place or places. On September 10 the cruiser *Diana*, from Port Arthur, was dismantled at Saigon, and the crew were interned there till the end of the war.

Case of the *Lena*, Sept., 1904, at San Francisco.

On or about September 13, the Russian transport *Lena* arrived at San Francisco. The United States authorities notified the commander of the vessel that he would be required to depart or dismantle in a brief period. It has been

[1] The *Novik* reached Tsing-tau uninjured, and left after a stay of ten hours (*Times*, August 16, 1904), and was therefore not disarmed. She was sunk in Korsakovsk Harbour, Sakhalin, by the Japanese cruisers *Chitose* and *Tsushima* (*Times*, August 22, 1904).

[2] *Times*, August 19, 1904.

conjectured that the vessel came from Vladivostock, the great number of men and guns being accounted for on the hypothesis that she had on board the crew of the *Novik*, which had been driven on shore after the defeat of the Vladivostock squadron. It was announced in the *Times* on September 16 that it had been finally agreed the vessel should be dismantled. The American view of dismantling requires the removal of all the fighting weapons of the vessel. The crew and officers of the *Lena* were placed on parole pending agreement between the belligerent Powers and the United States as to their disposal.

Dismantlement of belligerent vessel in neutral port after defeat condemned by Mr. W. E. Hall.

It may safely be anticipated that the true construction of these facts in the light of international law will afford controversy to future writers on international law. If the disarmament had been entirely voluntary, or even if it had merely been the result of an agreement between the neutral Power and the belligerent to whom the vessel disarmed belonged, the situation might be explained. But it is clear that this was not the case, but that, on the contrary, Japan took a leading part in the negotiations that led to disarmament, and that it was owing to her action that the crews were interned at a specified place in the neutral ports. There seems a precedent for this action in the protest addressed by Captain Winslow, the commander of the *Kearsage,* to the agent of the Confederates at Cherbourg, after the engagement in which the *Alabama* was sunk, June 21, 1864, off Cherbourg. In this protest Captain Winslow demanded the surrender to him of that portion of the crew of the *Alabama* who had escaped capture by taking refuge on French soil. But this only affected the destiny of a few score sailors, and the threat of Captain Winslow was a mere *brutum fulmen,* inasmuch as that portion of the crew of the *Alabama* which escaped to land were not interned. But the result of Japanese action at Shanghai, Tsingtau, Saigon, and San Francisco has been that thousands of men have been interned practically as prisoners of war on neutral soil. As between the neutral Powers, Germany, France, China, and the United States, and Russia, the belligerent, it should appear that the exterritoriality of

the public armed ship of war, a fundamental postulate of maritime law, constitutes an insuperable obstacle to any dismantling or disarmament which does not take place with the full consent of the belligerent. But as the other belligerent appears to have taken a leading part in the proceedings leading to dismantlement in each case, this can hardly have been the case.

Mr. W. E. Hall explicitly states: (1) "That a vessel of war is not liable to be disarmed on taking refuge after defeat;" (2) "To disarm a vessel, or to render her permanently immoveable, is to assist her enemy."[1] Thus the incident above detailed appears indefensible, so far as the facts are yet known, even allowing full weight to Mr. W. E. Hall's contention that the tendency, which he approved, would be for neutrals to limit the stay of belligerent cruisers. But he equally considered that the neutral was under no international obligation to do so. This last conclusion renders the current events all the more inexplicable. There is certainly nothing in Mr. W. E. Hall's work from which one could reasonably infer that he considered that the sanction of municipal regulations limiting the stay of the belligerent cruiser in the neutral port was the dismantlement and disarmament of the vessel. It may, of course, be said that the facts are not yet all known. Historicus declined to discuss the *Alabama* affair because of the want of evidence in 1863. But it is difficult to believe that any very material circumstance remains to be known about the dismantlement of the Russian war vessels.

It must, however, be admitted that the analogies of land warfare support the action of the neutral Powers in the present war towards Russian war vessels who have taken refuge after defeat. There seems a difference between the two cases, because the theory of exterritoriality cannot be invoked in the case of an army which has taken refuge on neutral territory after defeat, like the army of General Clinchant in Switzerland in 1871. When it is the case of a defeated army taking refuge in neutral territory, "It has been the invariable practice in late wars to disarm the troops crossing the neutral

[1] Hall's "International Law," pt. iv. c. iii. pp. 626, 627.

frontier, and to intern them till the conclusion of the peace." [1] If the cost of supporting the defeated army is levied upon the defeated belligerent, this has the indirect effect of favouring unduly the victorious belligerent, since the latter would have had to support the vanquished force if it had surrendered to him. On the other hand, it is very onerous on a neutral to support for a long time a considerable body of men. The Hague Convention (Article 58) imposes upon the neutral State the duty of supporting the interned troops, subject to reimbursement on the conclusion of hostilities. Mr. W. E. Hall suggested that perhaps the equity of the case and the necessity of precaution might both be satisfied by the release of such fugitives under a convention between the neutral and belligerent States by which the latter should undertake not to employ them during the continuance of the war.

[1] Hall's "International Law," p. 626.

CHAPTER X.

THE RULE OF THE WAR IN 1756.

The rule of the war in 1756, a belligerent claim.

THE right of neutrals to carry on all legitimately acquired trade was seriously threatened by what is known as the rule of war of 1756. In the eighteenth century European countries, by legislation upon the lines of the English navigation laws, were in the habit of restricting the commerce of their colonies to vessels of their own country. During the war against this country in 1756 the French became disabled, through their relative weakness upon the sea, from carrying on trade with their colonies. They then handed over the trade between the mother-country and her dependencies to Dutch vessels, but continued to exclude other neutral traders. The English prize courts thereupon condemned all Dutch vessels captured in the course of such traffic, on the ground that vessels so engaged had, in fact, passed into the merchant service of France. The rule was extended in 1793 so as to prohibit all neutral trade with the colonies and coast towns of the enemy which had not been open before the war. The principle upon which the English decision proceeded was stated as follows by Lord Stowell in the *Immanuel*:—

Its original operation in 1756.

Extension in 1793.

"Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding (colonies)? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent, of course—and if the belligerent chooses to direct his means to such an object, what

right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, 'True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress.'"

Dispute between Great Britain and United States, 1803.

On behalf of the United States, Mr. Munroe, in a letter to Lord Mulgrave of September 23, 1803, insisted that neutrals were entitled to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace. This view has, upon the whole, prevailed among American statesmen and jurists, though Chancellor Kent has intimated a different opinion.

Sir R. Phillimore's division of the subject.

The question is not free from difficulty, and the answer depends upon the familiar compromise between neutral and belligerent rights. Phillimore[1] usefully distinguishes the following cases:—

(1) The carrying on by the neutral of the trade between the belligerent mother-country and the colonies.

(2) The carrying on the coasting trade of the belligerent—such trade being confined in time of peace to the belligerent subjects.

(3) The carrying on the trade by a neutral from a port in his own country to a port of the colony of the belligerent.

(4) The carrying on by a neutral of a trade between the ports of the belligerent, but with a cargo from the neutral's own country.

Opinion of Story, J., that rule ought not to be extended to neutral trade with the colonies of a belligerent,

In the first two cases the view seems reasonable that a neutral accepting a licence to trade in effect incorporates himself in the enemy fleet, and may fairly be treated as belligerent. As Mr. Justice Story expressed it: "The property is considered *pro hac vice* as enemy's property, as so completely identified with his interests as to acquire a hostile character." English lawyers will find little to criticize in the conclusion of the same high American authority on the general question.

[1] "International Law," vol. iii. p. 299.

where no ulterior belligerent destination.

"The British," he continues, have extended the doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial trade (with the mother-country) and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded, but its late extension is reprehensible." In fact, the extension with which Mr. Justice Story quarrels can only be defended on the assumption that the rights of neutrals are confined to trade which they possessed before the outbreak of war—an assumption quite impossible to reconcile with many facts which are not in question.

The doctrine of continuous voyage.

The English application of the rule in 1793 was rendered still more severe by what was known as the doctrine of continuous voyage. Orders in Council had so far relaxed as to allow the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence in a neutral bottom. This led to colourable evasions by neutral shippers, and the question was much discussed by what evidence the *bonâ fide* of a transhipment was to be established. Lord Stowell held that the landing of the goods and the payment of duties in a neutral harbour was evidence enough of a *bonâ fide* importation. "If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid." [1]

Application of, where no genuine importation into neutral country.

Opinion of Lord Stowell; importation genuine when goods landed and duties paid.

The real issue in such cases was well shown in a short conversation between the court and counsel in the *Polly*: [2]

Court: "Is it contended that an American might not purchase articles of this nature (in Spain) and import them, *bonâ fide*, to America on his own account, and afterwards export them?"

It was answered, "No, that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that

[1] The *Polly*, 2 C. Rob. at p. 369. [2] Ibid. p. 365.

no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bonâ fide* importation for the American market."

In the latter case of the *William*,[1] the test was stated by the Court of Appeal to be more general.

"Let it be supposed," the judgment ran,[2] "that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That these acts have been attended with trouble and expense cannot alter their quality or effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it."

Sir W. Grant in the *William* (1806) 5 C. Rob. 385, 395

Since the Declaration of Paris, the only interest attaching to the Rule of the War of 1756 is that, according to many writers, it has bequeathed to the law of contraband the doctrine of continuity of voyage. It seems both historically and logically inconsistent that the United States, who were opposed to the Rule of the War of 1756, should have been the State that first engrafted one of the leading doctrines of that rule on the law of contraband. It is elsewhere urged that decisions of Lord Stowell's time appear to justify the conclusion that the doctrines of continuous voyage and the conveyance of contraband were not regarded as radically disparate conceptions in English prize courts.

[1] 5 C. Rob. 385.

[2] Ibid., at p. 395.

CHAPTER XI.

THE RIGHT OF VISITATION AND SEARCH.

The right of visitation and search a fundamental postulate.

Sir H. S. Maine observes that "from the very beginning of international law a belligerent has been allowed to prevent a neutral from supplying his enemy with things capable of being used immediately in war.[1] Vattel supplies the corollary: "We cannot prevent the conveyance of contraband goods without searching neutral vessels that we meet at sea, therefore we have a right to search them. . . . At present, a neutral ship refusing to be searched would from that proceeding alone be condemned as lawful prize."[2] In what Phillimore considers "one of the most careful and best reasoned judgments" of Lord Stowell, that great judge reminds us that, in the above passage, Vattel was to be considered not as a lawyer merely delivering an opinion, but as a witness asserting facts as to the existing practice of modern Europe (*i.e.* in 1758). Lord Stowell then proceeded to express some surprise that Vattel should have mentioned it as a modern law, since it is a principle of the civil law, on which international law is founded, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Lord Stowell proceeded, "Conformably to this principle we find in the celebrated French Ordinance of 1681, now in force, Article 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller Commentary, p. 81, says expressly, that although the expression is in the conjunction, yet resistance alone is sufficient. He refers to the

Vattel on the right of search.

Lord Stowell in the *Maria* (1799) 1 Rob. 340, 343.

[1] Lectures, "International Law," v. p. 105.

[2] "Droit des Gens," l. iii. c. vii. s. 114.

Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance or combat.' "And recent instances are at hand and within view from which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of Admiralty,[1] is in the Order of Council, 1664, Article 12, which directs, 'That when any ship, met withal by the Royal Navy or other ship commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize.' A similar article occurs in the Proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time; for they are expressly censured by Lord Clarendon (Life, p. 242)."[2] Even supposing that these seventeenth-century proclamations are inconsistent with the right of visitation and search as understood now, the astonishing fact remains that this belligerent right was admirably described in the "Liber Niger Admiralitatis" so far back as the middle of the fourteenth century. It is, therefore, curious to note that prize law in this country, the most essential part of the maritime law of war, seems to claim a considerably earlier notice than the maritime law of general average, the first case of which occurred in Elizabeth's reign.[3] In this country the law of general average does not apply to the case of a successful defence of a private armed vessel. It does not seem irrelevant, in view of the important part that might conceivably be played by mail steamers of large size armed for purposes of self-

[1] The reference here is to the "Blacke Booke of Admiralty" (Liber Niger Admiralitatis), B. 7 & 8. Sir Travers Twiss assigns the date of this portion of the "Blacke Booke" to somewhere between 1337 A.D. and 1351 A.D., Introd. p. xix. He further points out that "An early instance of the Admiral's judicial authority to decide the question of prize or no prize occurs in A.D. 1357" ("Rym. Fold.," p. 14). It is interesting to note that No. 7 B., beyond all question, is a provision on the right of search in time of war. (See also Phillimore's "International Law," vol. iii. p. 436, and note.)

[2] The *Maria*, (1799) 1 Rob., 340, 363, *et seq.*

[3] *Hicks* v. *Palington*, (1590) F. Moore, 297.

defence in time of war, to recollect that by the laws of other European countries, a construction has been placed upon the law of general average by which, in the case of a successful defence by a private armed vessel, the owners of the different interests in vessel and cargo are liable to contribute in general average both to the "wounds of the ship" and the wounds of the sailors.[1] It is submitted that this circumstance throws a light on the Continental tendency to fit out Volunteer Fleets, as instanced by the action of Prussia in 1870, and by that of Russia in the present Russo-Japanese War. In the *Nereide*, ((1814) 8 & 9 Cranch, I. Wheaton, Curtis' Decrees Supreme Court of the United States, 322, 426–7), Story, J., said—

Story, J., on incontrovertible nature of the right of visitation and search.

"The Black Book of the Admiralty expressly articulates that any vessel making resistance may be attacked and seized as enemies; and this rule is enforced in the memorable prize instructions of Henry VIII.: Clerk's Praxis, 164; Rob. Collect. Marit., p. 10, and note, and p. 118. The ordinance of France, 1584, is equally broad; and declares all such vessels to be good prize; and this has ever since remained a settled rule in the prize code of that nation. Valin informs us that it is also the rule of Spain; and that in France it is applied as well to French vessels and cargoes, as to those of neutrals and allies, Coll. Marit., 118; Valin, 'Traité des Prises,' c. v. s. 80. There is not to be found in the maritime code of any nation or in any commentary thereon, the least glimmering of authority that distinguishes, in case of resistance, the fate of the cargo from that of the ship."

Mr. W. E. Hall. Mr. W. E. Hall observes—

"The privilege has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself."

The right of visitation and search is indissolubly connected as Vattel observes, with the prevention of the conveyance of contraband. One quotation given by Halleck from the "Blacke Booke of Admiralty" has clearly nothing to do with the belligerent right of search, but seems confined to the execution of revenue laws or other municipal regulations in

[1] *Taylor* v. *Curtis*, (1816) 6 Taunt., 608.

the ports and bays or within one marine league of the coast.[1] But Sir Travers Twiss, in a note to No. 7 B. "Blacke Booke," says that the law and custom on the subject of the belligerent right of search are set forth in a letter from Edward III. to Peter, King of Aragon. In Kent's Commentaries it is stated that "the right of visitation and search is founded upon necessity, and is strictly a war right, and does not rightfully exist in time of peace, unless conceded by treaty."[2] Lord Stowell said, "No one can exercise the right of visitation and search upon the high seas, except a belligerent power."[3] A great number of treaties or conventions were concluded (1831–40) by which different countries conceded to each other the right of visitation and search in time of peace for the suppression of the slave trade.[4] A discussion arose between the Governments of Great Britain and the United States out of the claims of British cruisers on the coast of Africa to visit American vessels suspected of being engaged in the slave trade. It was common ground that "the Right of Approach," as it is called, on the high seas in time of peace could be exercised in the case of piracy. The issue between the two countries was whether the slave trade was piracy or not. It had previously been decided by the courts, both of England and America, that the slave trade was not contrary to the law of nations.[5] In 1858 Lord Lyndhurst stated that any interference by a British cruiser with a vessel which bore the American flag would involve apology and reparation if the vessel were justified in using that flag. In 1862, by treaty, Great Britain and the United States mutually conceded the right to visit merchant vessels of the other country, which were suspected of engaging in the slave trade. The subject is now regulated by the General Act of the Brussels Conference relative to the slave trade, signed at Brussels, 1890. Within a certain zone, the signatory Powers have agreed to exercise the right of visit, search, and detention (*droit de visite, de*

Right of visitation and search exclusively an incident of war.

Right of approach in time of peace for prevention of piracy.

Whether the slave trade is piracy.

By General Act of Brussels Conference, 1890, right of approach may be exercised for prevention of slave trade.

[1] "International Law," vol. ii. p. 240.

[2] Commentary on American Law, vol. i. p. 153.

[3] The *Louis*, 2 Dods., Rep. 210.

[4] Pistoye and Duverdy, "Des Prises," tit. i. c. iii.

[5] The *Antelope*, 10 Wheat, R. 66; The *Diana*, 1 Dods., R. 95

recherche et de saisie) of vessels at sea of less than 500 tons burden, which there is reason to believe are engaged in the slave trade. In the early part of the nineteenth century, Great Britain claimed and exercised a right of search over the public armed vessels of the United States for deserters from the British army and navy. Such a pretension cannot now be seriously urged.[1] The result is that the right of visitation and search in time of peace is limited to the purpose of ascertaining the national character of a suspected vessel. It is thus called in French *droit d'enquête de pavillon* as opposed to the right of visitation and search in time of war (*droit de visite ou de recherche*). The former may be exercised either—

(1) In the case of suspected piracy;
(2) In the case of vessels committing crimes against municipal law in the territorial waters of the Power making the visit;
(3) In the case of vessels suspected of having hostile intent against a Power in time of peace;
(4) Under the General Act of the Brussels Conference, 1890.

With the above exceptions, therefore, in modern times the right of visitation and search (*droit de visite et de recherche*) can only be exercised in time of war.

Method of exercise of right of visitation and search.

The usual mode adopted by most of the maritime Powers of Europe of summoning a neutral to undergo visitation is the firing of a cannon on the part of the belligerent. This is called by the French *semonce, coup d'assurance*, and, in English, affirming gun.[2] It is, undoubtedly, the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such an affirming gun, for its use is by no means universal. Moreover, any other method, as hailing by signals, of summoning a neutral to submit to such an examination is no less effective than the affirming gun, if the summons is actually communicated to, and understood by, the neutral. The means used are not essential, but the fact of

Mode by firing gun not universal.

[1] Hall's "International Law," 5th ed., p. 718.

[2] "*Semoncer*" means "to warn in a loud voice," *not* "to summon;" cf. Halleck's "International Law," vol. i. p. 580.

summons actually communicated is necessary to acquit the visiting vessels of all damages following upon neutral disobedience.[1] Treaties in international law operate as exceptions.[2] Several treaties have affirmed, modified, or taken away, between the contracting parties, the right of visitation and search. It is to be remarked that all treaties which have been concerned with this subject have admitted the exercise of this right in time of war.[3] The leading treaty which affirms and incorporates the common law of nations upon this subject is the famous Treaty of the Pyrenees (1659) between France and Spain, Article 17. It is curious to note that this article of the Treaty of the Pyrenees confines the right of search to the examination of the passports and certificates, and omits, or, indeed, implicitly excludes, the right of search of the cargo. It is clear, from the judgment of Lord Stowell in the *Maria*, (1799) 1 Rob. 340, 359, that the right of visitation and search in English law extends to search of the cargo. It is of some interest to note that in a debate on the Appropriation Bill,[4] on which the question of British shipping and Russia was raised, the Prime Minister, apparently following the judgment of Lord Stowell (*supra*), expressed a decided opinion that a belligerent who captured a vessel had a right to examine the cargo.

Continental doctrine that right of search cannot be exercised over convoyed vessels.

The right of search is sometimes denied in the case of vessels under convoy. The first instance in which the immunity of convoyed vessels was asserted was by a declaration of Queen Christina of Sweden, August 16, 1653. The most recent chapter to the history of the question is the scheme of the *Institut de Droit International*[5] for a *Réglement des Prises Maritimes*, by which the visit of neutral vessels, convoyed by ships of war of their own State, is prohibited. The naval prize code of the institute represents the modern Continental

Adopted by Institute of International Law, 1883.

[1] Cf. Halleck's "International Law," vol. ii. p. 258, and authorities there cited.

[2] Cf. English Reply to Prussian "Exposition des Motifs," Collectanea Juridica, vol. i. p. 144, styled by Historicus (Letters, "International Law," p. 202) as "best model of reason and common sense which can be proposed to a juridical writer." It seems at a latter date to have been the view of Pitt ("Speeches," vol. iii. p. 227, 228) that treaties operated as creating exceptions.

[3] "De Hautefeuille," t. iii. p. 450. [4] *Times*, August 12, 1904.

[5] "Annuaire," 1883, p. 215.

Disputed by Great Britain.

view of prize law as opposed to that of England and the United States. It was passed by a majority of the members of the institute, but opposed by the English representatives. The Institute of International Law, on the subject of the immunity of convoyed vessels from the right of search, did little more than reaffirm the principle of the armed neutrality. England has always from the first resisted the doctrine of the immunity of convoyed vessels. But in 1801, by treaty with Russia, Sweden, and Denmark, Great Britain modified her resistance to the doctrine so far as to abstain from exercising a right of search over convoyed vessels, except where ground for suspicion existed, and then only in the presence, if required, of an officer of the neutral public armed vessel convoying the merchant ships. But by treaty in 1812 and 1814 matters reverted to their old footing, and left the Baltic powers free to assert, and Great Britain to refuse, the immunity of convoyed vessels. England has perhaps sacrificed something in the present war by adhering to her traditional policy. Russia, of all Powers in the world, could least complain of another Power asserting the doctrine of the immunity of convoyed vessels. Great Britain could ground her adhesion to the doctrine on the prize code of the Institute of International Law with more reason as Russia purports to derive her naval regulations from that prize code. At the present day the result of Great Britain adhering to the doctrine of the immunity of convoyed vessels would be the protection of all her shipping in the Far East, except such as wilfully engaged in the conveyance of contraband. The *Malacca* incident would have been impossible. When it is remembered that the Foreign Enlistment Act, 1870, s. 8, not only embarrasses an important branch of British industry, but also greatly exceeds the requirements of international law, the self-denying character of the neutrality of Great Britain becomes clear. In the interests of what Historicus called "the sacred traditions of neutrality," Great Britain embarrasses industry at home and, in the light of the experience of the present war, to some extent injures her mercantile marine. And all this could be remedied by a repeal of the shipbuilding section of

But limited mode of, accepted by, 1801.

Doubtful expediency of English refusal to recognize immunity of convoyed vessels.

the Foreign Enlistment Act, and by our accession to a principle passed by the majority of the members of the Institute of International Law in 1882. The fact that, with the exception of the American Civil War, this country has never been called upon to consider its position as a neutral in a war between two powerful maritime nations, constitutes an obviously sufficient reason for withdrawing its refusal to the doctrine of the immunity of convoyed vessels. Were we to adopt that principle, our powerful navy would afford complete protection to all the mercantile marine which is engaged in legitimate trade. There would be no real apostasy in our doing so, since there is the precedent of 1801. And, in any event, no future historian could compare our action with that of the States who formed the first armed neutrality. In that case the moral sense is justly offended at a renunciation of principles only a few years after they were openly adhered to. But it is practically nearly a century since Great Britain refused to admit immunity to convoyed vessels. Since then England has made memorable sacrifices, in 1856 and in 1872, to the sacred traditions of neutrality, and the result on neither occasion has been such as to warrant either a repetition or continuance of the process.

It may be said that our present assumption of neutrality only fulfils the high ideals which Mr. Canning advocated "with an imagery wrought up with consummate skill, and expressed in language of extraordinary beauty."[1] But the theme of Mr. Canning in 1819 was that the neutrality suitable for this country was to be dictated by a chivalrous regard for the weakness of Spain. A weak State, Spain could not enforce from Great Britain, a powerful neutral, any exact standard of neutrality. This very circumstance, Mr. Canning argued, ought to make this country adopt the same standard of neutrality that she would adopt if she were a weak neutral and Spain a powerful belligerent. It would not be reasonable to apply this reasoning to the present political position, especially when it is remembered, as it must be, that we have even bettered Mr. Canning's instruction, and

[1] May's "Constitutional History," vol. ii. p. 119.

imposed neutral duties on ourselves beyond the requirements of international law. It is a question which demands consideration whether the injury to Great Britain when a belligerent of freeing convoyed vessels would not be compensated in periods of neutrality.

The following are leading decisions on the subject of the right of visitation and search in English and American Courts:—

Cases on the right of visitation and search and the right of approach.

(1) The *Nereide* (1814), 9 Cranch, 440, which decided that the right of search is not a right wantonly to vex or control neutral commerce, or indulge idle curiosity; but it grows out of and is ancillary to the right of capture, and can never arise except as a means to that end.

(2) The *Maria*, (1799) 1 Robson, 340. This case is referred to by Mr. W. E. Hall[1] as the recognized expression of English doctrine. Lord Stowell (then Sir W. Scott) said *supra*, pp. 359, 360, "That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect

[1] "International Law," 5th ed., p. 724 and note.

right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflict of rights can possibly exist.

(3) The *Marianne Flora*, (1826) 9 Wheaton, 39, decided that though the right of search of foreign vessels does not exist in time of peace, yet a cruiser has a right to approach for purposes of observation. There is no obligation to affirm a flag with a gun by an American cruiser in time of peace. The vessel so approached in time of peace is under no obligation to lie by, but neither has she a right to fire at a cruiser approaching, upon a mere conjecture that she is a pirate, and if this be done, the cruiser may lawfully repel force with force, and capture her.

(4) The *Catherine Elizabeth*, (1804) 5 Robson 232, which decided that resistance by an enemy master will not affect the cargo, being the property of a neutral merchant.

(5) The *Eleanor*, (1817) 2 Wheaton 262, which decided that the commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. Where a capture has actually taken place, with the assent express or implied, of the commander of a squadron, the prize-master may be considered as a bailee to the use of the whole squadron, who are to share in the prize money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron. The commander of a single ship is responsible for those under his command, as are, likewise, the owners of privateers for the conduct of the commanders appointed by them. To detain for examination is a right which a belligerent may exercise over every vessel, except a national vessel, which he meets with on the ocean. The principal right necessarily carries with it all the means essential to its exercise; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem in war.

If, in consequence of the use of this stratagem, the crew of the vessel detained abandon their duty before they are actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible. Whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent prize-master and crew: not because the original crew, when left on board (in the case of the seizure of a vessel of a citizen or neutral), are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. But this rule does not extend to the case of a mere detention for examination, which the commander of the cruising vessel

may enforce by orders from his own quarter-deck, and may therefore send an officer on board the vessel detained in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew.

The modern usage of war authorize the bringing one of the principal officers of the vessel detained on board the belligerent vessel with the papers for examination.

(6) The *Fanny*, (1814) 1 Dods. 443, which decided that salvage is due for the recapture of neutral goods previously taken by the enemy on board a British armed ship.

(7) The *Eliza and Katy*, (1805) 6 Rob. 185, which decided that even when the master, supercargo, and owners of a ship are implicated in the same intention of concerting fraud against the belligerent rights of this country, the vessel will be restored when she is seized after she has been released, and is sailing with a copy of her restitution on board. A captor cannot recover his costs if he withholds papers.

(8) The *Nicholas and Jan* was alluded to by Lord Stowell in the case of the *Betsey*, (1798) 1 Rob. 92, 96, in the following terms: "The *Nicholas and Jan* (1784) was one of several Dutch ships taken at St. Eustatius, and sent home under convoy to England for adjudication. In the mouth of the Channel they were retaken by the French fleet; there was much neutral property on board, sufficiently documented, and in that case a demand was made on behalf of a merchant of Hamburg for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger by bringing it home, whilst they might have resorted to the Admiralty Courts in the West Indies; and, therefore, that the claimants were entitled to demand indemnification from them. But on this point the court was of opinion that, under the dubious circumstances in which those cases were involved, and under the pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion which is necessarily intrusted to them by the nature of the command. It was also urged against the claimants in that case that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on these grounds our courts rejected their claims."

(9) The *Sarah*, (1801) 3 Rob. 330, which decided that a prayer to admit extraneous evidence on the part of the captor to show an illegal course of trade will not be granted, there being nothing in the original evidence to point to such a suspicion. The Court of Admiralty is at all times studious to preserve the simplicity of prize proceedings.

(10) The *Rising Sun*, (1799) 2 Rob. 104, which decided that though spoliation of papers is not a cause of condemnation, a

master will be refused his freight when there is a spoliation unaccounted for and unexplained traced home to him, and when the master asserts himself, on the strength of incredible evidence, to be the owner of a great part of the cargo, a great part of which consists of specie.

(11) *Livingston & Gilchrist* v. *Maryland Insurance Company*, which decided that a policy of marine insurance is not avoided by the concealment of spurious papers covered with a belligerent character, if it be necessary and allowable to have on board such papers by the usage and course of trade. The rule that concealment and spoliation of papers, while they do not ordinarily induce a condemnation of the property, always afford cause of suspicion, and justify capture and detention, does not apply to spurious papers covered with a belligerent character for the purpose of protection.

(12) The *Hunter*, (1815) 1 Dods. 480, where it was held that though by the law of every maritime court of Europe spoliation of papers not only excludes further proof, but does *per se* infer condemnation, the laxity of our code has, however, modified the rule to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act. The reason for the rule that spoliation works condemnation is that it is founded on a presumption *juris et de jure* that it was done for the purpose of suppressing evidence.

Even in English prize law spoliations generate a most unfavourable presumption, Sir W. Scott observing that "a case that escapes with such a brand upon it is only saved so as by fire." In such cases further proof consists partly of affidavits and papers not on board the vessel, partly of the conduct of the parties. The further proof, in order not to let in condemnation of the vessel, where there has been spoliation of papers, must be overwhelming proof.

(13) The *Commercen*, (1816) 1 Wheaton, 382, which decided that a neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight. In this case, Story, J., held that, *inter alia*, the spoliation of papers affects the neutral with the forfeiture of freight.

(14) The *Frow Johanna*, (1803) 4 Rob. 348, which decided that the responsibility of captors under a commission of unlivery does not extend to forcible robbery of goods properly deposited in turn.

Sir W. Scott observed, "The goods were taken *jure belli*. The captor had a right to bring them in, and if any accident

had happened in so doing, he would have been excusable, except for want of due care on the part of himself or his agents. When the goods were brought in, they were placed under the custody of the law. It became necessary to take them out of the ship, and the captor obtained a commission of unlivery from the court; they were put into warehouses, and nothing had been advanced to show that these warehouses were not proper places and sufficiently secure. The question comes forward, therefore, on the general principle, and on this point I am disposed to think that the captor is not responsible for a loss happening to goods whilst they were under the custody of the law." The captors, after obtaining a commission of unlivery from the court, are not liable in assumpsit.

(15) The *Pizarro*, (1817) 2 Wheaton, 227. In a prize cause the ship's papers should be brought into court and verified on oath by the captors, and the examinations of the captured crew taken upon standing interrogatories, and not *viva voce*. The cause should be heard, in the first instance, upon those papers and examinations, and upon such bearing it is for the court to determine whether further proof shall be allowed. If the court below deny an order for further proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party and appears on the record, the appellate court can administer the proper relief.

But if evidence in the nature of further proof be introduced and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived. Concealment or spoliation of papers is not *per se* a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court, but it is open to explanation.

(16) The *St. Juan Baptista and La Parissima Concepcion*, (1803) 5 Rob. 33, decided that a resistance to search not substantiated is not a criminal act in the case of neutral ships sailing prior to hostilities.

The dicta of Sir W. Scott on this case are of great interest. A mere attempt to escape, before any possession assumed, never draws with it the consequences of condemnation.[1]

Sir W. Scott said—

"The principle of the law (of visitation and search) is fully established and admitted on all sides. It is, indeed, a principle which has found its way into most of the maritime codes

[1] "International Law," 5th ed., p. 35.

of civilized countries. It has undergone much discussion lately, and the consequence has been to give additional sanction to the principle, and to establish it more firmly in practice."

In saying that it must be shown that the vessel had reasonable grounds to be satisfied of the existence of war, otherwise there is no such thing as neutral character, nor any foundation for the several duties which the law of nations imposes on that character, Sir W. Scott showed how completely he differed from the views of the advocates of the armed neutralities, that the state of neutrality is not a new state, but a continuation of a former one. The facts of this case possess some historical interest. A modified right of visitation and search (*droit d'enquête de pavillon*) exists in time of peace, but only where piracy is suspected. In the case of the *St. Juna and Baptista* and *La Purissima Concepcion* it was held that the British privateer would have been justified in stopping a vessel on the high seas if suspected of piracy. But it appears that the Spanish vessels which were seized by the privateer entertained suspicions that the British privateer was a pirate. These suspicions Sir W. Scott considered were perfectly justifiable. At that time the Spaniards greatly dreaded Barbary cruisers, and the vessels were stopped "at a considerable distance from land, but not in any place so remote from the scenes that Barbary pirates usually haunt" as to make apprehensions unreasonable. The case establishes the reality of piracy so late as 1803. The *Johanna Emilie*, (1854) 1 Spinks, 317, decided that the legal consequences of destruction or spoliation depend for the most part upon the circumstances of each case. Lord Stowell's judgments, Dr. Lushington observed, do not contain any direct definition of the word "spoliation." Destruction of papers is not necessarily spoliation unless it is destruction of papers relevant to the adventure. The destruction of a private letter, after the vessel had left her port, if construed as a spoliation of papers, would carry the doctrine to an absurd length. The case of the *Hunter*, 1 Dod. 480, only showed that further proof is allowed after a grave spoliation of papers in the absence of

best evidence. The case of the *Two Brothers*, 1 C. Rob. 131, did not turn on the spoliation of papers, but on a defect of proof by the claimant that he had any interest in the question. It is a strong case of spoliation when papers are destroyed on the appearance of the chasing vessel. Time is of great importance. It is the strongest proof that papers contain some matters which would inure to condemnation when the papers are destroyed: (1) when the capturing vessel is in sight; (2) when there is a chance of capture; (3) at the time of capture; (4) clandestinely after capture. The case remains one of spoliation, but of a less stringent nature, when papers are destroyed a long time antecedently.

The *Der Mohr*, (1802) 4 Rob. 314, decided that when a ship is lost by the negligence of the prize-master, the whole freight is due in value from the captor.

Die Fire Damer, (1805) 5 Rob. 357, decided that where the prize is lost by the wilful neglect of the prize-master in refusing to receive advice or take a pilot on board, restitution will be decreed with costs and damages. This was a case of wilful misconduct and vexation on the part of the captors. The capturing vessel was a privateer, which appears to have been lost after the capture. If that had not been the case, Sir W. Scott stated that he would have directed measures to be taken for the forfeiture of her letter of marque. This case is an authority for inflicting severe damages upon those captors who have behaved with cruelty towards the captured crew.

What are a ship's papers for the purpose of belligerent visitation?

It is necessary to consider what are the papers whose spoliation involves the condemnation of the vessel in other countries, and has a material effect in that direction according to English prize law.

By English prize law.

"According to the English practice these documents ought generally to be—

"(1) The register, specifying the owner, name of ship, size, and other particulars necessary for identification, and to vouch the nationality of the vessel.

"(2) The passport (sea letter) issued by the neutral State.

"(3) The muster roll, containing the names, etc., of the crew.

"(4) The log book.

"(5) The charter-party, or statement of the contract under which the ship is let for the current voyage.

"(6) Invoices containing the particulars of the cargo.[1]

"(7) The duplicate of the bill of lading, or acknowledgment from the master of the receipt of the goods specified therein, and promise to deliver them to the consignee or his order.

"And the information contained in these papers is in the main required by the practice of other nations. For the papers which may be expected to be found on board the vessels of the more important maritime nations, Professor T. E. Holland's "Admiralty Manual of Naval Prize Law" must be consulted, pp. 52–9. The Institut du Droit International proposes to require possession of the following papers as a matter of international legal rule :— Proposal of Institute of International Law.

"(1) Les documents relatifs à la proprieté du navire ;

"(2) Le connaissement." (Bill of lading.)

"(3) Le rôle d'équipage, avec l'indication de la nationalité du patron et de l'équipage ;

"(4) Le certificat de nationalité, et les documents mentionnés sous le chiffre 3 n'y suppléent ;

"(5) Le journal du bord. 'Ann. de l'Inst.,' 1883, p. 217.

"The modern practice of the right of visit is fully expounded in the instructions drawn up by the Spanish Minister of Marine and communicated to the British Foreign Office, May 3, 1898. See *London Gazette* of that date, and Hertslet's 'Comm. Treaties,' vol. xxi. p. 888.

"If the inspection of the documents reveals no ground of suspicion, and the visiting officer has no serious anterior reason for suspecting fraud, the vessel is allowed to continue its voyage without further investigation; if otherwise, it is subjected to an examination of such minuteness as may be necessary."[2]

Modern usage allows the master of the merchantmen to be summoned with his papers on board the cruiser,[3] and Usage of summoning master of vessel visited on board the belligerent cruiser.

[1] At the common law an invoice is not evidence of the contract, "as it is frequently not sent out till long after the contract is completed" (*Per* Best, C.J., in *Jones* v. *Bright*, (1829) 5 Bing., 533, 543.) But a document which is inadmissible for some purposes, may be admissible for others.

[2] Hall's "International Law," 5th ed., pp. 727, 728.

[3] The *Eleanor*, 2 Wheaton, 262.

the regulation of the German and Danish navies order that this shall be done,[1] but Pistoye and Duverdy (i. 237) think the practice open to the objections both from the point of view of the belligerent and neutral. The former may be easily deceived by false papers; and the latter is exposed to the less obvious risk that the documents necessary to prove the legitimacy of his adventure may be detained.

Usage condemned by Institute of International Law.

The proposed Réglement des Prises Maritimes de l'Institut provides that "le navire arrêté ne pourra jamais être requis d'envoyer à bord du navire de guerre de son patron ou une personne quelconque, pour montrer ses papiers on pour tout autre cause." "Ann. de l'Institut," 1883, p. 214.[2]

Improper exercise of right of visit does not invalidate capture.

It is of the utmost importance to remember that the absence of due conformity to the forms of visit, and of attention to the evidences of nationality, prescribed by the regulations of the State to which the visiting ship belongs, is not sufficient to invalidate the capture if it be proved before the prize court that due cause of capture was, in fact, existing. "La Tri-Swiatitela, Dalloy, Jurisp. Gen. Ann.," 1855, vol. iii. p. 73.[3]

Right of visitation and search can be exercised on three conditions.

To sum up: the right of visitation and search can only be exercised—

(1) By vessels provided with a commission from their sovereign since privateering is abolished;
(2) Over neutral mercantile vessels;
(3) Upon the high seas, or within the territorial waters of the belligerent or his enemy.

The case of the *Malacca*.

During the present Russo-Japanese war the *Malacca* incident raised, in a very acute form, questions connected with the right of search. The *Malacca*, a P. & O. steamer, was arrested on the morning of July 13 two miles and a half off the Great Harnish, near Jebel Zugur, off the coast of Erithrea, near the southern end of the Red Sea, by the Russian volunteer cruiser *Petersburg*, and was definitely taken possession of by a prize crew of forty men, in spite of the protests of the captain, who declared that the ammunition on board was the property of

[1] "Rev. du Droit Int.," x. 214, 238.
[2] Hall's "International Law," 5th ed., p. 727.
[3] See Hall's "International Law," 5th ed., p. 728 q.v.n.

the British Government, and was for the use of the British Navy at Singapore and Hong-Kong. The British crew were kept under strict arrest. The *Malacca* arrived at Suez at dawn on the 19th, but no communication was allowed with the shore. On July 20, 2.10 p.m., she reached Port Said flying a naval ensign. The crew and passengers were landed. She then proceeded to Algiers, where she was released on July 27. Although the seizure took place on July 13 it was not reported till five days afterwards in the *Times*. It was stated on behalf of the P. & O. Company that the only explosives or munitions of war on board the *Malacca* were the consignment of forty tons of lyddite, which were shipped by the British Government for Hong-Kong.[1] It will be in general recollection that the vessel was released at Algiers on July 28 without being taken before a prize court. The complexity of the situation created by the seizure of the *Malacca* is instanced by the fact that the incident involved—

(1) The doctrine of the territoriality of marginal seas within which a belligerent may not exercise his right to intercept contraband.[2]

(2) The improper exercise of the right of visitation and search, inasmuch as the *Malacca* was searched at Algiers, a neutral port.[3]

The commander of the *Malacca* complained—

(*a*) That he was treated as a prisoner of war, and "although a captor may detain persons in order to secure their presence as witnesses, he cannot treat them as prisoners of war."[4]

(*b*) That five of his men were summoned on board the *Petersburg*. This is contrary even to the modern Continental

[1] *Times*, July 21.

[2] Cf. Phillimore's "International Law," vol. iii. p. 424, and the official log of the *Malacca*, *Times*, August 26, 1904.

[3] The right of visitation and search may not be exercised in the ports, harbours, or territorial waters of a neutral. Phillimore's "International Law," vol. iii. p. 424; Hall's "International Law," c. x. p. 746; Halleck's "International Law," vol. ii. p. 240. Vattel observes that we may search neutral vessels "we meet at sea" ("Droit des Gens," l. iii. c. vii. s. 114).

[4] Hall's "International Law," p. 734, and *Times*, *supra*, for official log of the *Malacca*.

view of the right of visitation and search as expressed in the Réglement des Prises Maritimes of the Institut du Droit International, "Annuaire de l'Institut," 1883, p. 214. It is only legitimate to summon on board the captor vessel the master of the neutral vessel seized as far as usage is concerned.[1] Additional circumstances of aggravation in the case of the *Malacca* are that Captain Skalsky of the *Petersburg* threatened to employ force if the English sailors resisted being brought over to the *Petersburg*. They were detained five hours or more, and each severely questioned as to the nature of the cargo received on board at Antwerp, and were all informed that the Russian Government would liberally allow them a percentage on what would be prize for any information they might give. On Captain Street informing Captain Skalsky of the *Petersburg* that he regarded this as "a very unfriendly and high-handed proceeding," inasmuch as no portion of the *Malacca's* crew could be considered prisoners of war, he was threatened with arrest.[2]

Further, the seizure of the *Malacca* by the *Petersburg*, not being a vessel entitled to exercise belligerent rights, involved—

(3) Infringement of the succession of treaties, beginning with the Treaty of Adrianople, 1829, Art. 7, and concluding with the Treaty of Berlin, providing for the inviolability of the Dardanelles against the armed vessels of any foreign Power.

(4) Infraction of the declaration respecting maritime law signed at Paris, April 16, 1856, by Russia as regards Art. 1, "La course est et demeure abolie."

It was recognized by Mr. Balfour[3] that the material issue in the *Malacca* incident did not arise from the improper exercise of the right of visitation and search, but from the facts that the *Petersburg* was an unqualified cruiser, and that Great Britain was prepared to claim the incriminated cargo as belonging to the British Government. Mr. Balfour regarded "the whole episode of the *Malacca*" as "exceptional," and considered that it did not involve considerations connected with the rights or liabilities of neutral navigation and commerce.

No conceivable construction of the right of a belligerent

[1] Cf. Hall's "International Law," 5th ed., p. 727.

[2] Cf. official log of the *Malacca*, *Times*, August 26; and letter of the Secretary of the P. and O., *Times*, August 4, 1904.

[3] *Times*, August 28, 1904.

to intercept contraband *in transitu* can extend it to the detention of the military stores of the Government of a neutral State, consigned in its own vessels to a neutral destination. The *Petersburg* and *Smolensk* detained not only the military stores of the British Government, but also those of the Government of Germany and of the United States. The *Smolensk* captured the Hamburg-American vessel *Scandia*, carrying ammunition for the German Government in the South Sea, and the *Ardova*, carrying 250 tons of gunpowder for the United States War Department in the Philippines. Both these last two vessels were released on or about July 25–26, at Suez. All three cases, therefore, illustrate the familiar rule that when the neutral Government is prepared to claim the incriminated cargo as its own property, the belligerent captor must release the vessel conveying it, without bringing the vessel before a prize court.

CHAPTER XII.

THE DESTRUCTION OF NEUTRAL VESSELS.

THE law on this subject is contained in two decisions of Lord Stowell arising out of the war between this country and the United States in 1812. During this war the navy of the United States acted uniformly on the principle of destroying enemy's vessels at sea.

Decisions of Lord Stowell: The *Zee Star*, (1801) 4 Rob. 71.

There is, however, one earlier decision of Lord Stowell, on the subject of the destruction of a neutral vessel by a captor.[1] This was the case of a neutral ship and cargo restored by consent, having been taken July 9, 1799, on a voyage from Archangel to Lisbon. The case came before the court on an application for the captor's expenses on the one side, and for costs and damages on the part of the other. The captors consented to restitution, and therefore the case is an authority for the position that to destroy a neutral ship is a punishable wrong.[2] It establishes further that where a captor exhibits a want of due diligence by delaying the giving of his consent to restitution for nearly three months, demurrage will be given against him. The neutral owner in this case must have contributed to his own loss, as the court held he was only entitled to simple restitution, and not to costs and damages.

Peculiar conditions of the war of 1812.

The two principal cases are the *Acteon*, (1815) 2 Dods. 48, and the *Felicity*, (1819) ibid. 381, both decisions of Lord Stowell's. It will be seen that they are, strictly speaking, instances, not of the destruction of a neutral vessel by a belligerent captor,

[1] The *Zee Star*, (1801) 4 Rob. 71.

[2] Cf. Hall's "International Law," 5th ed., p. 735.

but of the destruction of a vessel belonging to a subject of one belligerent State, trading under a licence granted by the Government of the other belligerent, by a captor of the latter State. But it seems quite clear, from Sir W. Scott's judgments, that a subject of a belligerent State who trades under a licence granted by the other belligerent State is in *pari materia* with the subject of a neutral State, provided he trades in strict conformity with the conditions of the licence, and produces it when required to do so. The ship and cargo owned by the subject of the belligerent State are equally exempt from capture with one owned by the subject of a neutral state. The circumstances under which the licences were granted were as follows. In 1812 the town of Cadiz was almost the only spot in Spain that was not occupied by or influenced by the French. The British Government, therefore, being very desirous that the port of Cadiz should receive a constant supply of American flour, granted numerous licences, authorizing any vessels not being French vessels or bearing the French flag to import from any port of the United States, cargoes of grain, meal, flour, or rice without molestation on account of any hostilities which might exist between his Majesty and the United States, even if the ships and cargoes belonged to American citizens. Such ships were to return to any port not blockaded. Licences were issued for this purpose, which were to be in force for nine months. These licences were transmitted from this country by various merchants, brokers, or agents who applied for them to the United States. The date of the licence was the date of their clearing from the port of entry, and each licence was endorsed with the names and tonnage of the vessel and the names of the master. The first of the cases above alluded to—the *Acteon*, (1815) 2 Dodson's Rep. p. 48—was the case of an American ship which, on January 24, 1813, sailed from Norfolk in Virginia to the port of Cadiz, laden with a cargo of about 4200 barrels of flour, which had been shipped under a British licence, dated August 13, 1812, and was to be in force for nine months from the time of its date. On the 27th of February the vessel arrived at Cadiz, and the master, having delivered its cargo,

The *Acteon*, (1815) 2 Dod Rep. 48.

produced the licence under which he sailed to the British Minister resident at that place, who granted him a further licence, permitting him to ship a cargo of lawful merchandise, and to return with it to any port of the United States of America. On the 1st of April the master set sail from Cadiz, bound to Boston. In the course of his voyage he was boarded by several British ships, the commanders of which examined his licence, and permitted him to proceed on his voyage, which he accordingly did till about noon on the 12th of May, when he was captured by his Majesty's ship *La Hogue*, commanded by the Hon. Captain Capel, who, on the evening of the same day, set fire to the vessel and destroyed it. A claim was made for the ship and cargo as the property of citizens of the United States of America, protected by licences granted by his Majesty's Government and by his Excellency the Minister Plenipotentiary of Great Britain at the Court of Spain, and at the instance of the claimant a monition was issued calling upon the captors to proceed to the legal adjudication of the ship and cargo. An appearance was given under protest for the captor. The captors did not contend against a sentence of restitution, but objected to the payment of costs and damages. In his judgment, Sir W. Scott observed that the only question was what was to be the measure of the restitution. The natural rule is, that if a party be unjustly deprived of his property he ought to be as nearly as possible placed in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution, with costs and damages. But this general rule was subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called "simple restitution." It makes no difference what are the motives of the party inflicting the injury, the suffering party is entitled to a full compensation if he has not contributed to the loss, even if the captor has been guilty of no wilful misconduct. The destruction of the property by the captor may have been

a meritorious act towards his own Government, but still the person to whom the property belongs must not be a sufferer. As to him, it is an injury for which he is entitled to redress from the party who inflicted it upon him, and if the captor has by the act of destruction conferred a benefit on the public, he must look to the Government for his indemnity. The loss must not be permitted to fall upon the innocent sufferer. In the case of the *Acteon*, Sir W. Scott considered that the following were immaterial considerations urged in justification of the capture and destruction of the vessel. It was immaterial that some of the licences had been transferred from one vessel to another, that the particular licence in the case of the *Acteon* had been bought, or that an untrue allegation that the time had expired had been made and was believed. It was further immaterial that there were on board private letters written home by the officers of the American squadron, as the fact they were not exhibited demonstrated that they were not of a public nature or dangerous tendency. A further and more important conclusion of Sir W. Scott on the *Acteon* was that it was even immaterial to urge in justification of the destruction of the vessel that the British commander could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston because she would have furnished valuable information. These circumstances may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain Capel as far as his own Government was concerned, but they furnished no reason why the American owner should be a sufferer. Sir W. Scott considered that there was nothing that could be imputed to the owner which justified capture or destruction, and therefore that he was entitled to receive the fullest compensation from the captor. The American claimant, it may be finally observed, was considered entitled to restitution with costs and damages, although the court expressly held that the belligerent commander, having ăcted from a sense of duty and obedience to orders, would in turn be entitled to be indemnified on making a proper representation to his Government. At the

conclusion of the report of the case of the *Acteon*, it is stated that a similar decree was made in another case, the *Rufus King*, where the facts were similar to those in the case of the *Acteon*.

The *Felicity*, (1819) 2 Dod. 381.

The second authority on the subject of the destruction of a neutral ship by a belligerent is the *Felicity*, (1819) 2 Dodson, 381. This case decided that if a captor destroys a ship for which a belligerent licence has been granted, he or his Government is responsible for the loss occasioned by such destruction; but if the existence of the licence was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, he is exempt from responsibility.

The *Felicity* was an American ship which originally sailed from Charleston with a cargo of rice for Cadiz, where she arrived at the end of May, 1813, and delivered her cargo. At Cadiz she took on board a return cargo, consisting of wine and fruit. She sailed therewith on October 31, 1813, bound for Boston; but having met with bad weather and sprung a leak, and being in great distress, jettisoned nine hundred boxes of raisins between the 14th and 16th of December. The leak still continuing, and the vessel being within one hundred miles of the Bermudas, the master and crew resolved to steer for those islands, and approached within seven leagues of them; but, the wind proving adverse, it was determined to shape the course of the vessel for Charleston. On January 1, 1814, they fell in with H.M.S *Endymion*, which immediately hoisted English colours and fired a gun. A boat's crew immediately boarded the *Endymion*, and the *Felicity* was found to be in a leaky state, with her sails split, and her rigging in an unserviceable state and much disabled. The master of the *Felicity* was taken on board the *Endymion*, when, his papers having been inspected and examined and no licence found, he was repeatedly asked if he had a licence, and he invariably replied he had not. As it was doubtful if the *Felicity* could have ever reached a British port, and as the *Endymion* was the only ship on the station of corresponding force to an American frigate which she was detached to watch, the captain of the

Endymion determined to destroy the *Felicity*. A lieutenant, sent with a boat's crew from the *Endymion* to destroy the *Felicity*, asked the supercargo and mate of the latter if there was any licence. They replied they did not know of any, and the ship was then set fire to. When the master of the *Felicity* perceived the vessel to be on fire, he called for his chest and produced a paper, purporting to be a licence, from a concealed place, and requested to be put on board his ship. At this time there was a heavy sea running and it was impossible to comply. The claim was for ship and cargo, as the property of citizens of the United States, protected from seizure by a licence granted by Sir H. Wellesley, envoy extraordinary, in pursuance of an order in council bearing date April 13, 1812.

Sir W. Scott said, "Taking this vessel and cargo to be merely American, the owners could have no right to complain of this act of hostility, for their property was liable to it, in the character it bore at that period of enemy's property. There was no doubt that the *Endymion* had a full right to inflict it, if any grave call of public service required it. Regularly a captor is bound by the law of his own country, conforming to the general law of nations to bring in for adjudication, in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation, which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country, which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port.

Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them." On the particular point of the licence, Sir W. Scott held that the captor would have been liable to the extent of the whole mischief done, if knowledge of its existence could have been imputed to him, either from its production or estimate. But the rule *de non existentibus et non apparentibus* clearly applied to the case of a licence whose existence was not disclosed. The decision, therefore, was against the claimants on the point of the licence.

The *Leucade*, (1855) 2 Spinks, 228.

These decisions were followed, as Professor T. E. Holland observes,[1] by Dr. Lushington in the case of the Ionian ships. This case decided that when it is doubtful whether the status of a vessel seized is that of a neutral or of a belligerent, the decision turning on the nice construction of public documents, the captor is not liable in costs and damages for having seized the vessel without probable cause. In this case Dr. Stephen Lushington observed—

"The general rule, therefore, is that if a ship under neutral colours be not brought to a competent court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty to release her."[2]

[1] *Times*, August 7, 1904. [2] The *Leucade*, (1885) 2 Spinks, 228, 232.

It would appear, therefore, that prize courts in this country never gave law costs in the proper acceptation of the term, *i.e.* costs without damages. But costs and damages, constituting complete indemnity for the capture, were given, never upon the ground that the papers of the captured vessel did not disclose a probable cause of capture, but where it appeared the captors were guilty of misconduct or vexation. Dr. Stephen Lushington observes in the case of the *Leucade* [1] that there are in the books only some fourteen or eighteen cases of this kind, though the volume of work in the prize court was so great that on one occasion Lord Stowell commenced with an arrear of nearly eight hundred cases. It would have been "more than a Herculean task" to have investigated all these cases, and as all claimants were desirous of obtaining restitution as soon as possible, since ships and cargoes are perishable commodities, simple restitution took place in hundreds of cases simply on payment of captor's expenses. The usual evidence adduced was that of the master and crew of the captured ship, excluding all evidence from the captors. The reason for this was that captors, from the nature of their occupation, were constantly moving about from place to place. It was, however, an everyday practice to admit evidence from the captors for incidental questions, as to prove a blockade *de facto*. Captor's evidence to procure condemnation was nearly always excluded. As the courts refused to condemn in almost all cases, there was little practice as to the admission of captor's evidence to show probable cause of capture. It was observed in the case of the *Leucade* that Lord Stowell adhered most pertinaciously to the great rule that the case should be heard on the claimant's evidence, and that restitution should pass without admitting captor's evidence. In the same way Lord Stowell refused to decree costs and damages.[2] In the *Leucade* Dr. Stephen Lushington followed the principles of Lord Stowell, observing that if the question had been raised before Lord Stowell, he would not have allowed it to occupy five minutes of his most valuable time. Dr.

[1] The *Leucade*, (1855) 2 Spinks, p. 234.
[2] Ibid., 228, 244.

Stephen Lushington allowed in the case of the *Leucade* the captors to give explanatory evidence of notorious facts and circumstances, such as that the Ionian islands were at that time under the exclusive protection of Great Britain, and that their flag was, to some extent, joined with the British. Therefore the claimants, the owners of an Ionian vessel trading in the Sea of Azoff, though that trade was in fact legal, were held not entitled to costs and damages from the British captors. In a letter to the *Times*, under the heading of "Russian Prize Law," already referred to, Professor Holland states, with reference to the last three cases—

"I had summarized the effect, as I conceived it, of the group of cases above mentioned in the following terms: 'Such action (*i.e.* the destruction of a neutral vessel by a captor) is justifiable only in cases of the gravest importance to the captor's own State, after securing the ship's papers, and subject to the right of the neutral owner to receive full compensation."[1]

Prof. T. E. Holland on the case of the *Felicity*.

Especial importance is to be attributed to the last words. On this view Lord Stowell held that a captor was at liberty to destroy a neutral vessel subject to the payment of full compensation. To employ the language of Vattel, a captor who sinks a neutral's vessel and renders him full compensation, "only makes use of his own rights, and consequently does the neutral no injustice."[2]

Destruction of neutral ship, whether a wrong or conditionally justifiable.

But it seems impossible to deny that there is a certain obscurity, if not actual contradiction, in Lord Stowell's own words. The language used in the passage quoted by Professor T. E. Holland (*supra*) is as follows:—

"Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified, under any such circumstances, by a full restitution in value."[3]

[1] *Times*, August 30, 1904.
[2] Vattel's "Droit des Gens," l. iii. cvii. s. 3.
[3] The *Felicity*, (1819) 2 Dods. Rep. 381, 386.

Lord Stowell therefore held that the destruction of a neutral vessel by a captor is at once an act that cannot be "justified," and that it is conditionally "justifiable" on the captor's giving full restitution in value. In the case of the *Zee Star*, (1801) 4 Rob. 71, as has been noticed, Lord Stowell treated the destruction of a neutral vessel by a captor as a case for restitution. But in the case of the *Acteon*, (1815) 2 Dod. Rep. p. 48, Lord Stowell equally considered that the only exception to the rule, that the owner of a neutral vessel was entitled to restitution, with costs and damages, was, where the neutral has by his own conduct in some degree contributed to the loss. The neutral, who is the suffering party, is entitled to full compensation if he has not contributed to the loss, whatever may have been the motive of the captor. But it is one thing to say that the rule, that the neutral owner is entitled to restitution, with costs and damages, is susceptible of modification on the contemporaneous condition of the neutral having contributed to his own loss, and another and quite a different thing to say that the destruction of a neutral vessel becomes justifiable on a condition subsequent, that the captor renders full restitution in value. It is clear that both Sir R. Phillimore and the late Mr. W. E. Hall construe the rule as laid down by Lord Stowell in the case of the *Acteon* as being only susceptible of modification where the owner has directly contributed to the loss, and not in the somewhat obscure language of the judgment in the case of the *Felicity*.

Sir R. Phillimore and Mr. W. E. Hall, semble, regard destruction of neutral ship as a wrong.

Sir R. Phillimore states: "If a neutral ship be destroyed by a captor, either wantonly or under an alleged necessity in which she herself was not directly involved, the captor, or his Government, is directly responsible for the spoliation. The gravest importance of such an act to the public service of the captor's own State will not justify its commission. The neutral is entitled to full restitution in value." [1]

Phillimore evidently did not share the view that the destruction of a neutral vessel by a captor can be rendered justifiable

[1] "International Law," vol. iii. s. 333, p. 432.

by a tender of restitution. Nor does Mr. Hall lend any support to this view. He draws the distinction—

"Destruction of neutral vessels or of neutral property on board an enemy's vessel would be a wholly different matter to the destruction of enemy's vessels."

This last he approves of *sub modo* on the ground that the property in an enemy's vessel passes to the captor, and "persons who have no proprietary interest in the objects destroyed have no right to complain of the behaviour of a captor who destroys an enemy's vessel.[1] This position is in all respects that of Lord Stowell in the *Felicity* when he said, "If impossible to bring in, their (*i.e.* the captor's) next duty is to destroy enemy's property."[2]

Mr. Hall considered the destruction of a neutral ship to be a "punishable wrong; if it cannot be brought in for adjudication it can, and ought to be, released."[3] The grounds for this conclusion are—The property in neutral ships and goods is not transferred by capture, therefore the captor must bring in the captured property for adjudication, and must use all reasonable speed in doing so. But since the captor is bound to bring in neutral ships and goods for adjudication, *à fortiori* he is prohibited from destroying either. It may be remembered that Lord Stowell said that even though it be doubtful whether the property is enemy, yet where it is impossible to bring in, the safe and proper course for the captor is to dismiss.[4] The conclusions of Mr. W. E. Hall that the destruction of a neutral vessel by a captor is a punishable act[5] are strictly consistent with Lord Stowell's observations in the *Felicity*, except as regards the somewhat contradictory expression that the destruction of a neutral vessel can be "justified" to the neutral by full restitution in value.[6] It is submitted that the case

[1] "International Law," 5th ed., p. 459.
[2] The *Felicity*, (1819) 2 Dods. Rep. 381.
[3] Hall's "International Law," 5th ed., p. 735.
[4] The *Felicity*, (1819) 2 Dod. Rep. 381, 386.
[5] Cf. the observations of Lord Stowell in the *Acteon*, (1815) 2 Dods. 48, 51, as to the neutral being "unjustly deprived of his property."
[6] The *Felicity*, (1819) 2 Dod. 381, 386.

quoad the neutral is one not of justification, but of compensation. The question, further, is hardly more than a logomachy. The destruction of a neutral vessel by a captor is an incident which, to use Lord Stowell's words, may "produce a national quarrel."[1] The destruction of a neutral vessel by a captor renders the captor's Government liable, and does not call for any application of the prize law of the captor's court. This view is supported by Lord Stowell's own language, as interpreted by Sir R. Phillimore. The fact that the first Armed Neutrality had its origin in the destruction of two Russian—and therefore neutral—vessels by Spain in 1780, reminds us that the destruction of neutral vessels by a captor is an incident which may gravely affect international relations. But normal proceedings taken in the prize court of a captor do not give rise to international complications. Perhaps Lord Stowell, in the case of the *Felicity*, (1819) 2 Dods. 381, 386, in saying that the British commander encountered a collision of duties, the duty to bring in the prize and that of preserving undiminished his fighting crew, had in mind Vattel's language as to the collisions which "are of daily occurrence in war." Historicus pointed out that Vattel's doctrine of the conflict of rights was the rationale of two important American decisions of Chief Justice Story under the Neutrality Act of the United States, 1818. There seems, however, a certain inconsistency in explaining Lord Stowell's words, that the destruction of a neutral vessel by a captor is an act which is susceptible of justification in the terms of restitution by Vattel's doctrine of the conflict of rights. Duer recalls Lord Stowell's own axiom that there are no conflicting rights between nations at peace, and treats it as the reply to Vattel's doctrine of the conflict of rights.[2] Duer also points out that Vattel's theory of the conflict of rights, establishing the legality of contraband trade, is inconsistent and self-contradictory with what is equally assumed by Vattel, that the belligerent's right to intercept contraband *in transitu* is a necessary measure of self-defence. To describe the belligerent right to intercept

Lord Stowell's conclusion; destruction of neutral ship an incident that may produce a national quarrel.

[1] The *Felicity*, (1819) 2 Dods. 381, 385.

[2] "Marine Ins.," vol. i. p. 750.

contraband as self-defence is really to impute to the neutral an act of positive, though of indirect, hostility in prosecuting a trade with the other belligerent country in articles contraband of war. Duer thereupon argues with some plausibility that trade in contraband is both legal and illegal according to Vattel. If the doctrine of a conflict of rights cannot be invoked to explain the right of a captor of contraband, much less can it be invoked to explain the destruction of a neutral vessel by a captor. The act is therefore theoretically indefensible, and in practice there is absolute unanimity of authority as to the right of a neutral, whose vessel has been destroyed, to receive full restitution in value. By the model Réglemens des Prises Maritime de l'Institut du Droit International at Turin in 1882, it is provided that a captor may burn or sink a captured enemy's vessel.

Codes des Prises Maritimes de l'Institut du Droit International, 1882, does not permit destruction of neutral vessel.

"1. Lorsqu'il n'est pas possible de tenir le navire a flot, a cause de son mauvais état, la mer etant houleuse.

"2. Lorsque le navire marche si mal qu'l ne peut pas suivre le navire de guerre et pouvrait facilement être repris par l'ennemi.

"3. Lorsque l'approche d'un force ennemie superieure fait craindre la reprise du navire saisi.

"4. Lorsque le navire de guerre ne peut mettre sur le navire saisi un equipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûrete.

"5. Lorsque le port ou il serait possible de conduire le navire saisi est trop éloigné." "Annuaire de l'Institut," 1883, p. 221.

An attempt seems to have been made in the Russian Press to justify the Russian regulations of 1895, Article 21, and the instructions of 1901, Article 40, by reference to this Article 50 of the carefully debated *code des prises* of the Institut du Droit International. But there is no analogy between the two cases. While the Russian prize law draws no distinction between neutral and enemy ships, this Article of the carefully debated *code des prises* of the Institut du Droit International permits the destruction only of enemy vessels.[1] Historicus observed that he could only account for the fact that Galiani advocated the principle of free ships, free goods, and condemned the sale of contraband articles on

[1] Cf. Letter of Professor T. E. Holland, *Times*, August 6, 1904.

neutral territory, as on "some theory of retributive injustice." It is equally necessary to invoke this theory to explain how the destruction of neutral vessels by a captor can be justified by reference to a naval prize code, which, like that of the Institut du Droit International, ostensibly aims at minimizing the liability of neutrals, and the exemption of the private property of enemies from capture. In the letter referred to, Professor T. E. Holland observed—

Russian regulations permit the destruction of a neutral vessel.

"There is no doubt that by the Russian regulations of 1895, Article 21, and instructions of 1901, Article 40, officers are empowered to destroy their prizes at sea, no distinction being drawn between neutral and enemy property, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from a Russian port, danger to the imperial cruiser, or the success of her operations. The instructions of 1901, it may be added, explain that an officer 'incurs no responsibility whatever' for so acting if the captured vessel is really liable to confiscation and the special circumstances imperatively demand her destruction. It is fair to say that not dissimilar, though less stringent, instructions were issued by France in 1870, and by the United States in 1898; also that, although the French instructions expressly contemplate 'l'établissement des indemnités à attribuer aux neutres,' a French prize court, 1870, refused compensation to neutral owners for the loss of their property on board of enemy ships burnt at sea."

"The question, however, remains whether such regulations are in accordance with the rules of international law."

After summarizing the rules laid down by Lord Stowell in the cases of the *Acteon*, (1815) 2 Dods. 48, and the *Felicity*, (1819) 2 Dod. 381, Professor Holland continues: "It is not the case, as is alleged by the *Novoe Vremya*, that any British regulations contain the same provisions as the Russian on this subject. On the contrary, the Admiralty manual of 1888 allows destruction of enemy vessels only, and goes so far in the direction of liberality as to order the release, without ransom, of a neutral prize which, either from its condition, or from lack of a prize crew, cannot be sent in for adjudication." [1]

Admiralty Manual of 1888 orders release of neutral vessel which captor is unable to send in for adjudication.

[1] In the case of the *Felicity*, (1819) 2 Dods. 381, 386, Lord Stowell said, "Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss." In 1819 Great Britain acted on the rule laid down in "Il Consolato del Mare"—the authoritative

The Japanese instructions of 1894 permit the destruction only of enemy vessels, and Article 50 of the carefully debated *code des prises maritimes* of the Institut du Droit International is to the same effect. It may be worth while to add that the eminent Russian jurist, M. de Martens, in his book on "International Law," published some twenty years ago, in mentioning that the distance of her ports from the scenes of her naval operations often obliges Russia to sink her prizes, so that, "ce qui les lois maritimes de tous les états considèrent comme un moyen auquel il n'y a lieu de recourir qu'à la dernière extremité, se transformera nécessairement pour nous en régle normale," foresaw that, "cette mesure d'un caractère général soulévera indubitablement contre notre pays un mécontentement universel."

Le Nord censured the *Alabama* for not bringing in her prizes.

It would be curious to trace to its origin the adoption by Russia of the doctrine that the destruction of neutrals by a captor is *sub modo* a justifiable act. During the depredations of the *Alabama*, *Le Nord*, which is with reason believed to be the officially inspired organ in Western Europe of the Russian Government, commented adversely on a decision of the Tribunal of Commerce at Bordeaux, condemning the destruction of an enemy's vessels without the adjudication of a prize court—a criticism which would *à fortiori* cover the destruction of a neutral vessel by a captor. The French decision was given in a case in which the plaintiffs were the owners

sea code of the Western Mediterranean in the Middle Ages—which provided (c. 273), "The enemy's goods, found on board a friend's ship, shall be confiscated." Since the Declaration of Paris, 1856, Great Britain only searches neutral ships for contraband of war. As the right of search is not now exercised by Great Britain for enemy's goods, the substantial effect is that the Admiralty manual of 1888 is even more liberal, as regards neutrals, than the rule laid down by Lord Stowell. The rule as laid down in 1819 was, where doubtful whether enemy's goods or contraband, and impossible to bring in, the safe and proper course is to dismiss. The Admiralty manual provides that where it is impossible to bring in, the neutral vessel is to be dismissed, even if it carries contraband. By the rule of 1888, *à fortiori* the neutral vessel is to be dismissed, where it is impossible to bring in, when it is doubtful if it conveys contraband. It is, of course, necessary to add that, according to the rule as laid down by Lord Stowell, where it was impossible to bring in, the safe and proper course was to dismiss the neutral vessel, whether it was certain it conveyed enemy's goods or contraband. In 1819 Great Britain did not, and now does not, seize neutral goods on enemy's vessel. But the rule is not so clear as regards goods belonging to a neutral, but on board an enemy's merchant vessel.

of goods conveyed in vessel burnt by the *Alabama*, and the defendants were insurance companies. The real issue was, "Whether the *Alabama* was a pirate?" If so, the insurance companies were liable. The Tribunal of Commerce held that the *Alabama* was not a pirate because she never attacked any vessels but those of the enemy, and respected neutrals. Also, inasmuch as the United States were not a signatory of the Treaty of Paris, the *Alabama* was not a pirate because she was a privateer. This part of the decision of the Bordeaux Tribunal seems obscure, inasmuch as the *Alabama* was a commissioned vessel. However this may be, an influential Russian organ, in reporting the judgment, remarked on the total omission therefrom of any reference to the most delicate side of the international question—"the circumstance that the *Alabama* and *Florida* have not submitted their captives to the decision of a prize court, according to the received invariable rule, but have constituted themselves judges, and appropriated of their own authority goods seized on board Northern merchantmen."[1]

The excuse of the Confederate cruisers of the American Civil War is substantially the excuse of the commanders of Russian cruisers in the present Japanese War, that they have no ports into which they can take their prizes. Yet, forty years ago, Russian opinion did not consider that any excuse availed the *Alabama* and *Florida* to vindicate their practice of burning enemy's vessels. Mr. W. E. Hall observes that "the practice of the English and French navies has always been to bring in captured vessels in the absence of strong reasons to the contrary."[2] It is, however, true that he ascribes the rule of bringing in for adjudication only to self-interest, and not to motives of a permanent character. Belligerents at the present day, he proceeds, are likely to burn enemy's vessels because of the growing indisposition of neutrals to admit prizes within the shelter of their waters. Loccenius considered that a nation cannot lawfully exclude the prizes of a belligerent without previous treaty stipulations to that effect.[3] In an interesting letter which Captain Semmes addressed to

[1] *Times*, September 12, 1863. [2] "International Law," p. 458.
[3] "De Jure Maritimo," l. ii. c. iv. s. 7.

the *Times*, June 16, 1864, he argued that a neutral is bound to admit the prizes of a belligerent where there is no express prohibition.[1] This contention is open to doubt, but if established it would in many cases remove the excuse for burning prizes. By the International Convention, 1888, the prizes of belligerents may pass through the Suez Canal. By the French "Ordonnance de la Marine" (ii. 281) of 1681 a captor was allowed to destroy his prize in contingencies which are not really distinguishable from those detailed by the *code des prises maritimes* of the Institute of International Law, 1882, and the more recent Russian naval Prize Regulations. But this provision only speaks of a captor who is a privateer (*corsaire*). It must, however, be supposed that this provision empowered a privateer to destroy a neutral. The provisions of other French *ordonnances* were exceedingly severe, though Grotius approved of them.[2] The "Ordonnance de la Marine" (l. iii. t. ii. art. 7) even went beyond "Il Consolato del Mare," c. 273, in not only confiscating the enemy's goods, but also the neutral vessel in which they were carried. It seems, therefore, necessary to admit that the famous *ordonnance*, panegyrized by Lord Tenterden in Abbott on Shipping as "in matter, method, and style one of the most finished acts of legislation ever promulgated," sanctioned the destruction of a neutral vessel by a captor. But the maritime policy pursued by France at the period of her naval supremacy in 1681 was very conflicting. The courts appeared to have avoided giving full effect to the *ordonnance*, and ten treaties, concluded by France in the latter half of the seventeenth century, directly contradicted it by announcing the principle of "Free Ships, Free Goods."

The French Ordinances.

It is on the face of the authorities, including Valin and Lord Stowell, impossible to deny the right of a captor to sink an enemy's vessel. It is equally certain that the destruction of a neutral vessel rests on entirely different principles, and cannot even claim the authority of modern continental maritime law as formulated by the Institute of International Law.

[1] 3 Phillimore, p. 467, s. 363.

[2] "De Jure Bell. ac Pacis," l. iii. c. vi. s. 611.

Tendency of modern jurists to condemn destruction of enemy's vessel.

It is, however, interesting to note that Bluntschli (s. 672) and Dr. Woolsey (s. 148) condemn the practice of burning the enemy's merchant vessels at sea without adjudication. And, as has been seen, this seems even to have been the Russian official view in 1863. It is clear that the right of the captor to sink an enemy's vessel, and *à fortiori* the right of the captor to sink a neutral, are inconsistent with the principle of the immunity of all private property at sea. But the principle of the immunity of private property at sea in time of war is a principle which is in course of growth. It was advocated by the United States so far back as 1856, and the avowed purpose of the *code des prises maritimes*, promulged by the Institute of International Law in 1882, was to exempt private property of enemies from capture—an exemption totally inconsistent with Art. 50, which gives its sanction to the destruction of an enemy's vessel. Further, the principle of the immunity of private property (including enemy's private property) was adopted among the *vœux* of the Hague Conference of 1899.

The destruction of neutral merchant vessels inconsistent with theory of neutrality adopted by advocates of First Armed Neutrality.

The destruction even of enemy vessels is inconsistent with the principles of the Armed Neutralities, for the latter may be carrying neutral goods. Azuni ("Droit Maritime de l'Europe," 1805), who differed from Galiani as to the illegality of the sale of contraband goods on neutral territory, agreed with the latter that "the state of neutrality is not, nor can be, a new state, but a continuation of a former one." But the assumption of the right of a captor to sink a vessel, whether enemy or neutral, is totally inconsistent with the theory that neutrality is not a change, but a continuation of a former state, since in time of peace a neutral subject is not liable to have either his goods or vessel destroyed.[1] Again, the theory of the territoriality of the merchant vessel, characterized by Historicus as "the favourite Dagon of the high priests of the Armed Neutrality," loses the little plausibility it ever possessed by the assertion of the right of a captor to destroy a neutral vessel. A thing that can be destroyed by one who is

[1] "The Letters of Historicus, Neutral Trade in Contraband of War," p 127.

not the owner cannot claim inviolability, and inviolability is the most real inference from the theory of territoriality.

It is impossible to affiliate modern continental views of prize law upon the Armed Neutralities, and even if it were possible, these confederations conflicted with both authority and practice.

Sir R. Phillimore observed that the memoir of Count Goertz, the diary of Lord Malmesbury, the records of De Flassan and of Von Dohm establish, beyond the possibility of a reasonable doubt, three things respecting the first Armed Neutrality of 1780. Firstly, that it was the result of a cabinet intrigue availing itself of an accident. Secondly, that originally the Empress had fully adopted and meant to carry into effect the principles of international law contended for by England. Thirdly, that to the last she never clearly understood what she had done, or why she had given offence to Great Britain. It appears that Catherine II. herself designated the Armed Neutrality as *nullité armée* in a question addressed by her to Lord Malmesbury, asking him what harm it had done Great Britain. In 1780 England was at war with her Colonies, France, and Spain, and sought aid in an alliance with Russia. Spain having seized two Russian vessels, Potemkin, the reigning favourite of the Empress, availed himself of the wrath of Catherine to fit out a fleet destined to co-operate with England against Spain. But Count Panin, the Chancellor of the Empire, was hostile to the idea of an English alliance, and speciously suggested that an occasion presented itself to Catherine of appearing in the magnificent character of the lawgiver of the seas and the protector of neutrals. Hence the famous manifesto of neutral rights known as the First Armed Neutrality. Every one of the Powers composing the Armed Neutrality of 1780—France, Spain, Holland, Denmark, and Sweden—departed from the neutral obligations contracted by them as soon as they became belligerents. Phillimore observes that the second Armed Neutrality had a not more distinguished origin than the first; it was the offspring of a mad emperor of the same kingdom.[1]

[1] "International Law," s. 201, p. 285.

Galiani, who wrote to defend the conduct of the King of the Two Sicilies in adhering to the Russian league, held that a ship built and armed for war in a neutral port cannot be there lawfully sold to a belligerent.[1] This position was contested by Lampredi, the other advocate of the Armed Neutrality. Sir Alexander Cockburn, in his reasons for not signing the Geneva Award, convincingly demonstrated that the famous Article 6 of the Treaty of Washington did not represent pre-existing international law. The writings of Galiani are a conspicuous, though a single, argument to the contrary, a circumstance which justifies the criticism of Historicus on Galiani and those other advocates of the Armed Neutrality, who sought to minimise the liabilities of neutrals. An account is furnished in the *Law Magazine and Review* (vol. viii.) of the proceedings of the Institute at Turin in 1882, when the Naval Prize Code was passed, on which it is claimed that the Russian Naval Regulations of 1895 and 1901 are founded. The law of prize then promulged was recognized from the first as embodying the modern continental as opposed to the English and American views of the subject, and as involving changes in the substantive law of prize which were regarded as inadmissible by the English representatives, the late Mr. W. E. Hall and Professor T. E. Holland. An attempt to initiate a separate and previous discussion on those portions of the code which related to procedure and the constitution of prize courts, as to which there was no irreconcileable difference of opinion, failed. The English members then handed in a long series of amendments to the objectionable articles, and supported them seriatim, but only succeeded in carrying two or three of them. Other amendments were regularly defeated by large majorities, and the articles dealing with the substantive law of prize as opposed to procedure were ordered to be communicated to the Governments concerned. The writer of the article under consideration continues—

"It must, however, be remembered that the new code, though it no doubt represents the opinion of a majority of the Institute, cannot be taken to express the view of any of

[1] Wheaton, "History of International Law," p. 312.

its American or English members. None of the American members were present, nor did any of them send written communications upon the subject. The English members present opposed the new code in principle and in detail, and were supported in writing by their absent colleagues."

Naval strategy and the destruction of neutral vessels.

These facts will hardly commend the code to English public opinion. The continental view contains many difficulties in law, but it can be explained quite simply by reference to considerations of naval strategy. The right of a captor to sink a vessel is historically associated with commerce-destroying and privateering. Thus, when the French Ordinance of 1681 confers on a captor a right to destroy a prize, it specifically designates a captor who is a privateer (*corsaire*). At this date, it has been observed, the French practice was, on the whole, free ships, free goods; and therefore French captors only searched neutral vessels for contraband of war. But the case of the *Alabama* showed that a commerce-destroyer, although a commissioned vessel, may resemble a privateer in all essential respects. In the *Law Quarterly* (October, 1898, p. 409), Mr. Sakué Takahashi, in an article on "The Application of International Law during the Chino-Japanese War," quoting from Mahan's "Influence of Sea Power upon History," points out that there are two great systems of naval strategy.

"The one form of strategy is employed in the offensive and the other in the defensive, but active, method of naval warfare, which has lately received the name of 'commerce-destroying,' in the French *guerre de course*.[1] The essence of the first system of strategy is the concentration of effort upon preparation for attacking the enemy. By the second system it is only intended to maintain a naval war by preying upon the enemy's commerce, and to that end it is necessary to station the cruisers at vital points which commercial shipping must pass. This second strategical system was adopted by the French navy for many years, and at times had a marked effect in inducing her enemies to seek peace."

M. Sakué Takahashi, who is the compiler of the official history of naval warfare during the Chino-Japanese War,

[1] Mahan, pp. 8, 31, 133, 206, 229, 297, 317, 539.

points out that in the first period of the war the Japanese were compelled to adopt the offensive form of strategy and attack their enemy, and therefore there were few prize affairs in that period. In the final stage the Japanese squadron adopted the second form of strategy, and prize affairs increased everywhere.

The topographical and political conditions of the Russo-Japanese War have been such that the Russians have, to a certain extent, adopted simultaneously, though with a very different result, both forms of strategy. At Port Arthur they have attacked the Japanese in a series of disastrous sorties, and the Vladivostock squadron has equally assumed the offensive. But Russian activity during the war has been most noticeable in the field of commerce-destroying. Armed with naval regulations which do not even derive their authority from the continental maritime law, the Russians have preyed, with singular success and important political consequences, upon neutral commerce. The history of commercial life in this country for the last few months attests the efficiency of at least one branch of the Russian arms. The *jeu de mots*, "when is a war not a war," current in political circles in this country some years ago, has seldom admitted of so disastrous an application. The long list of interferences by Russia with British shipping suggests that depredation upon our commerce has only been effected because it could not claim, as in time of war, the protection of our navy.

The most recent construction of the legal quality of the act of a captor in sinking a neutral vessel appears to be that of Wheaton's editor.

Mr. J. B. Atlay says—

"If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. Twiss, 'International Law during the War,' s. 167, p. 331; the *Felicity*, 2 Dods. Ad. 386."[1]

The learned editor here adopts a view which is even more pronounced than that of Sir R. Phillimore. Mr. Atlay seems

[1] Wheaton, part iv. c. ii. s. 359*e*, p. 507.

to regard the destruction of a neutral vessel by a captor as an unconditionally unjustifiable act; while Professor T. E. Holland, as has been seen, regards it as conditionally justifiable on the payment of compensation. Again, Mr. Atlay speaks of reparation as consisting (semble) of the full value of the property destroyed. Lord Stowell held, in the case of the *Acteon*, (1815) 2 Dods. 48, 51, 52 that the measure of the restitution, where the owner of the neutral vessel has not by his own conduct in some degree contributed to the loss, is not only restitution, but restitution with costs and damages. If the master of the neutral vessel has contributed by his own conduct in some degree to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution. The compensation, therefore, in the case where the master of the neutral vessel has not contributed to the loss clearly consists of more than the full value of the property destroyed. The learned editor does not notice the naval prize code of the Institute of International Law.

The facts of the case of the *Knight Commander*.

The facts in the case of the *Knight Commander*, as detailed in the *Times*, July 26, are as following. The *Knight Commander*, a British steamer belonging to a company, sailed from New York on May 6, and from Manilla on July 11 for Shanghai and Yokohama with a general cargo. The owners denied there was any contraband on board. Early in the morning of July 24, she fell in with the Russian cruisers of the Vladivostock squadron off the peninsula Idzu, on the eastern side of the gulf near which Yokohama is situate. The Russians ordered the captain and crew to come on board one of the war ships in ten minutes, at the expiration of which they sank the vessel. The European passengers were detained by the Russians, and the crew were placed on board another British steamer, *Tsinan* and taken into Yokohama. The *Knight Commander* was subsequently adjudged a lawful prize by the Vladivostock prize court. No compensation has been offered so far, and, judging from the speeches of the Prime Minister and Lord Lansdowne, the prospect of ever obtaining it is remote. Yet Professor T. E. Holland stated in the *Times*, summarizing prize law as understood in this country,

that the sinking of a neutral vessel by a captor can only be justified by compensation. On the same day and place as the *Knight Commander* incident occurred, the Vladivostock squadron sank the German steamship *Thea*, chartered by a Japanese firm. The Vladivostock prize court adjudged the *Thea* a lawful prize because she had lost her status as a neutral ship. But compensation, denied in the case of the *Knight Commander*, was awarded in the case of the *Thea* by the same prize court. From the point of view of international law as understood on the continent, it is certain that at least one condition relied upon to justify the captor in sinking a neutral did not obtain in the case of the *Knight Commander*. This condition is that the captor is short of a prize crew to place on the neutral vessel. It was stipulated in the "Ordonnance de la Marine" of Louis XIV. that a privateer might sink a prize when to place a prize crew on the captured vessel would interfere with further operation. In the case of the *Knight Commander* the captain of the British steamer, *Tsinan*, on which the crew of the *Knight Commander* was placed, noticed that the Russian cruisers were crowded with men.[1] If this be true, a prize crew could have been placed on the *Knight Commander* without hampering the operations of the Russian squadron. But from the point of view of English prize law as enunciated by Lord Stowell in the case of the *Acteon* (*supra*), the circumstance that a captor cannot spare men to man the vessel captured does not relieve him of the obligation to make full compensation if he sinks a neutral ship.[2]

The second incident of this nature is the destruction of the Indo-China Steam Navigation Company's steamer *Hipsang*, near Port Arthur on July 16th. It appears from the reports in the *Times* that the *Hipsang* was attacked at night by a Russian destroyer, who sank her, thinking her to be a Japanese transport. Many of the Chinese on board were drowned, but the white crew and some of the Chinese were rescued by the Russian.[3] According to the finding of the Naval Court at Shanghai, August 23, the *Hipsang* was destroyed without any just cause or reason.

[1] *Times*, July 26, 1904. [2] The *Acteon*, (1815) 2 Dods, Rep. 48, 54.
[3] *Times*, July 20, 1904.

This incident has attracted much less attention than it deserves. As the vessel was destroyed by the Russians, who were besieged in Port Arthur, she cannot have been destroyed for attempting to run the blockade. The *Hipsang* was torpedoed, and in this connection it is curious to recall the passage in Sir H. S. Maine's Lectures on International Law, in which, citing from the writings of a famous French admiral, he expresses the conviction that the dismay caused by the destruction of a neutral vessel by a torpedo would lead to a proscription of the weapon.[1] It is significant of the extent to which men's minds have become heated, to quote an expression of Edmund Burke, by the horrors of war, that an incident such as the destruction of a British ship by a torpedo discharged from a public armed vessel belonging to a Power with which this country is at peace, should have passed without any serious comment. Even if the *Hipsang* was sunk by mistake in good faith, there arises a case for compensation. There is certainly nothing in Lord Stowell's judgments which suggests that a belligerent who sinks a neutral vessel by mistake is not liable to render at least simple restitution; and even the prize code of the Institute of International Law promulged at Turin in 1882 does not enumerate the mistake of a belligerent captor among the conditions justifying the destruction of the vessel. The accounts which have reached this country of the incident of the sinking of the *Hipsang* are very meagre. It is, therefore, important to recollect that the Naval Court at Shanghai has decreed that the *Hipsang* was destroyed without just cause or reason.[2]

The authoritative pronouncements on the subject of the destruction of the *Knight Commander* are the statements of Lord Lansdowne in the House of Lords,[2] and the speeches of the Prime Minister in the House of Commons,[3] and at the Foreign Office to the East India and China Trade Section of the London Chamber of Commerce.[4]

On July 28 Lord Lansdowne characterized the sinking of

[1] Lectures, "International Law," vii., pp. 147, 148.
[2] *Times*, August 29, 1904. [3] Ibid., August 12, 1904. [4] Ibid., August 26, 1904.

the *Knight Commander* as involving the commission of "a very serious breach of international law," and added that if the facts were as stated, "it was an outrage."[1]

On August 12 Lord Lansdowne stated that the Government of this country have never accepted the view of the Russian Government, that it is within the right of a belligerent to destroy a neutral vessel captured by him if that vessel has contraband of war on board her. The Government of the United States, and possibly those of other Powers, also declined to take this view. Sir Charles Hardinge, therefore, had been instructed to inform the Russian Government that it was assumed by his Majesty's Government that Article 21 of the Russian naval prize regulations, rendering it justifiable for the commanders of Russian warships to destroy a captured vessel without adjudication, could not be considered to apply to neutrals. Whatever might be the decision of the appellate prize court at St. Petersburg, his Majesty's Government were altogether unable to admit that the sinking of the *Knight Commander* was justifiable according to any principle of international law by which this country has ever regarded itself as bound. It would have a most injurious effect upon the commerce of this country if a captor was justified in sinking a neutral vessel because she had not sufficient coal on board to navigate her to the nearest prize court of the captor, or because the captor could not spare men to furnish a prize crew. Lord Lansdowne accentuated the distinction between the case of sinking a neutral and an enemy's vessel, and concluded by expressing the hope, though he could not announce anything which could be regarded as a definitive settlement of the question, that "these acts of the destruction of neutral vessels are not likely to be repeated." In the House of Commons the Prime Minister adopted the expression previously applied by Lord Lansdowne to the sinking of the *Knight Commander*, that it constituted an international outrage to sink a neutral ship. He considered that the Russian Government differed from the jurists of all other countries upon the right of belligerents to sink neutrals in certain circumstances. The Prime Minister

[1] *Times*, July 29, 1904, p. 4.

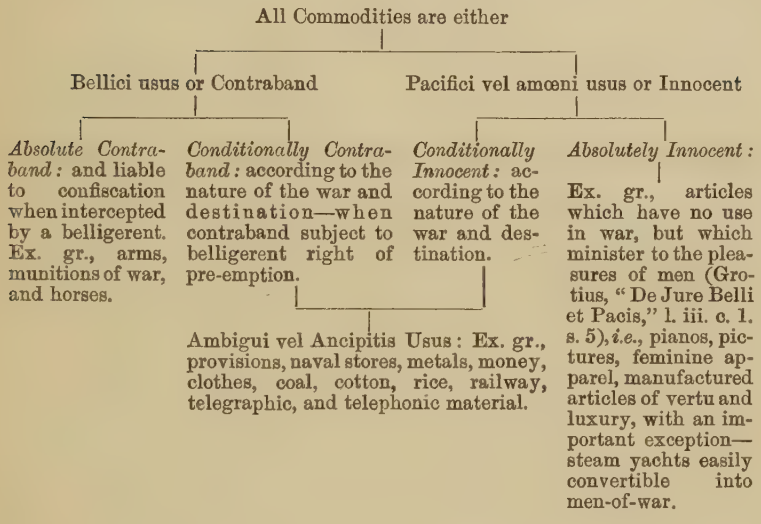
went beyond the statement of Lord Lansdowne in finding himself in a position to state, with certainty and definitiveness, that the Russian Government would not in the concrete carry out any such proceeding as sinking a neutral vessel. In the important statement made by Mr. Balfour a fortnight later, at the Foreign Office, he observed that the sinking of two British ships raised a most serious issue, but that one German ship had undergone the same fate, and that the Russian Government had paid compensation, not only for the German vessel, but also for a British vessel, the *Foxton Hall*. Nothing, however, was stated as regards compensation for either the *Knight Commander* or the *Hipsang*. A member of the deputation stated that the *Foxton Hall* carried a cargo of coal for the Russians, and that it was bought by the Russians. If this were the case, the sinking of the *Foxton Hall* raised different considerations from that of the *Knight Commander* and the *Hipsang*. But Mr. Balfour stated this did not quite accord with the information which reached him.

The interval which has elapsed since the sinking of the *Knight Commander* by the Vladivostock squadron on July 26, exceeds the interval which elapsed in the case of the *Zee Star* before the captors consented to restitution.[1] But a delay of two months and twenty days in consenting to restitution placed the captors so much in the wrong that Lord Stowell granted the claimants demurrage in that case.

[1] *Zee Star*, 4 Rob. 71. It was stated on March 16, 1905, that Sir Charles Hardinge, the British Ambassador, had handed to Count Lamsdorff the British claim for compensation on account of the sinking of the *Knight Commander*. The claim amounts to about £100,000. The Ambassador also presented independently the owners' appeal against the finding of the Vladivostock Prize Court. There has thus been a delay of nine months since the destruction of the vessel without any consent to restitution. The question of apology does not seem to have been raised, though in 1858 Lord Lyndhurst stated that an improper exercise of the right of visitation and search involves the necessity of an apology in the case of a vessel entitled to use the flag.

CHAPTER XIII.

NOTES ON CHART OF CONTRABAND.


All Commodities are either
Bellici usus or Contraband
Pacifici vel amœni usus or Innocent
Absolute Contraband: and liable to confiscation when intercepted by a belligerent. Ex. gr., arms, munitions of war, and horses.
Conditionally Contraband: according to the nature of the war and destination—when contraband subject to belligerent right of pre-emption.
Ambigui vel Ancipitis Usus: Ex. gr., provisions, naval stores, metals, money, clothes, coal, cotton, rice, railway, telegraphic, and telephonic material.
Conditionally Innocent: according to the nature of the war and destination.
Absolutely Innocent:
Ex. gr., articles which have no use in war, but which minister to the pleasures of men (Grotius, "De Jure Belli et Pacis," l. iii. c. 1. s. 5), *i.e.*, pianos, pictures, feminine apparel, manufactured articles of vertu and luxury, with an important exception—steam yachts easily convertible into men-of-war.

Reasons for perfectly new kinds of contraband making their appearance.

FROM a purely logical point of view a subject admits of division before it admits of definitions. The above classification is principally founded on the well-known classification of Grotius. Two reasons may be assigned for the increasing tendency in the domain of practice for perfectly new kinds of contraband to make their appearance: (1) War has become an art; (2) wars have tended to become more naval. It may be questioned whether, in the domain of theory, the law of contraband is at all uncertain. Logically speaking, Vattel's definition of contraband is adequate, precise, and clear. But for practical purposes what is required is a definition by quantitative enumeration — an extremely difficult matter.

Modern instance of axioms of Grotius on treatises declaring contraband.

Grotius, in his discussion of the subject of contraband,[1] observes that nothing can be inferred which is binding upon all from special conventions. The wisdom of this observation admits of a striking illustration in very recent times. Germany, in three commerce and navigation treaties with States similarly situated—San Salvador, Mexico, and Costa Rica—between 1869 and 1875, pledged herself to three different lists of articles prohibited as provisional contraband.[2] Historically speaking, nearly the same uncertainty exists as to what constitutes absolute contraband. It is submitted, however, that it is inaccurate to enumerate as the category of absolute contraband, horses and arms and munitions. It is quite true that horses have been expressly excluded by treaty. But this was by Russia, a State which is not now likely to restrict the category of contraband. Saltpetre was, and still is, universally considered absolute contraband, though the progress of warlike invention has deprived it of the importance which it once possessed in connection with operations of war. Nor is it wise to neglect instruction derived from treaties as to contraband character. If no reliance at all is placed upon treaties as to what constitutes contraband, the subject can only be treated abstractedly. But even Hautefeuille considers that the leading principles of the law of contraband have been more or less settled by general treaties, such as the Treaty of Utrecht and the Treaty of the Pyrenees.

Absolute contraband; what is?

Treaty of Utrecht, 1713, Art. 19.

Of these the Treaty of Utrecht, 1713, is the most important. Art. 19 of the commercial treaty of Utrecht anticipated the difficulty which has presented itself in modern times as to the nature of provisional contraband, and coal is an article as to which the keenest controversy has arisen. Hall points out that, owing to the lateness of the date at which it has become of importance in war, coal is the subject of a very limited usage.[3] Professor T. E. Holland observed in the *Times*, August 6, 1904, that provisions and coal have usually

[1] "De Jure Belli et Pacis," c. iii. c. 1, s. 5.
[2] Perels, "Droit Maritime, Paris," 1884, p. 274.
[3] "International Law," 5th ed., part iv. c. v. p. 660.

been denied a contraband character, in any sense of the term, on the continent. However, it is clear that by the Treaty of Utrecht it was recognized that both provisions and coal were liable to be considered contraband.[1]

Importance of coal anticipated by Treaty of Utrecht, 1713.

Apart from treaty, England in 1741 considered that only arms, saltpetre, and horses with their furniture were contraband.[2] Finally, in 1896, at Venice, the Institute of International Law laid down rules on contraband which were of a far-reaching character. It only recognized five categories of articles which would constitute absolute contraband as being of immediate use to the army or navy in actual warfare, when carried by sea at the cost of a belligerent and to the destination of a belligerent. Accidental or relative contraband was not recognized; but a belligerent had the right of sequestration or pre-emption of articles which might be useful for warlike as well as for peaceful purposes.[3]

"Reglementations" of Institute of International Law, 1896.

Though the "reglementation" of the Institute proposed to do away with provisional or accidental contraband, it cannot be said to have done so, as the right of pre-emption is reserved to the belligerent in the case of objects *ancipitis usus* seized while on the road towards a port of his adversary.[4] This express recognition of articles *ancipitis usus* and of a right of pre-emption is destructive of any proposal to abolish the category of provisional contraband. Articles *ancipitis usus* are all those articles which are provisionally contraband, the two expressions being merely synonymous.

Abortive proposal to abolish provisional contraband.

In the above chart an attempt has been made, necessarily inadequate, to instance rather than exhaustively enunciate the division of articles given in Grotius, and further to indicate the increasing tendency of modern times for perfectly new kinds of contraband to make their appearance.

[1] Cf. text of the treaty quoted by Hautefeuille, "Des Droits et des Devoirs des Nations Neutres," t. ii. titre viii. p. 320.

[2] See Burrell's "Admiralty Reports," p. 378.

[3] Address of Lord Reay, *Times*, September 23, 1904.

[4] Annuaire for 1896, p. 230.

CHAPTER XIII—(*continued*).

PARTS I., II., III.

CONTRABAND OF WAR AND THE JAPANESE AND RUSSIAN DECLARATIONS, 1904.

Contraband of War.

The origin of the term "contraband."

The term "contraband" was originally applied to a prohibited domestic trade in time of peace, such as that in salt.[1] The word does not occur in "Il Consolato del Mare," the authoritative sea-code of the Western Mediterranean, which largely determined the maritime policy of England till the Declaration concerning maritime law signed at Paris, 1856. Neither does the word, as opposed to the thing, occur in Cleiracq's "Guidon de la Mer," or in Grotius. The Treaty of Southampton, September 17, 1625, between Charles I. and the States-General of Holland, affords the first mention of the word "contraband" as used in public international law to denote a prohibited neutral trade with a belligerent.

[1] "Contrabannum—merces banno interdicta, Italis contrabbando, Gallo contrebande, Charta, anno 1445, tom. iii. Cod. Ital. Diplom. col. 1756, item quod non permittant committentes contrabanna, dicti salis vel aliarum rerum . . . in dictis locis tute et secure permanere."—Du Cange. Gloss (ed. Carpentarius), Parisiis, 1842. It is usual in dictionaries to represent the word as compounded of *contre* against; and *bande*, Low Latin *bandum*, a flag, standard, or emblem of authority. The word *bandum* is derived from Anglo-Saxon *ban*, *gebann*, interdict, proclamation, edict; Fr. *ban*, from O.H.G. *ban*, a summons; G. *bann*, the word belonging originally to the Teutonic languages: D. *ban*, excommunication; Icelandic and Swedish *bann*, proclamation; Dan. *band* or *ban*, band to curse. Grimm connects this word with Gothic *bandra*, a sign, whence *bandrjan*, to beckon. With reference to continental (especially Teutonic) history and usages, an edict of interdiction or proscription, whole cities were put under the ban; that is, deprived of their privileges. In the case of the celebrated Ban of Hungary, the word *ban* seems to have the meaning either of sign or signal summoning to insurrection, or else an association of territorial leaders raising the flag of a nation. The object of the conspiracy, which was organized by the Croatian *ban*, was to separate Hungary from the house of Hapsburg in 1664.

The thing itself, the conveyance of arms to an enemy, on the other hand, must have existed from the earliest times. Von Martens in a note observed, "We find, even among the ancients, prohibitions concerning arms carried to an enemy. L. 1, C. 2, D. quæ res exportari non debeant, L. C. de litoris et itinerum custodiis. Many popes, as Alexander III. (c. 6, 12, 17, De Judæis, Saracenis), Innocent III., Clement V., Nicholas V., Calixtus III., forbade the Christians, under pain of ban and confiscation, to carry arms to the infidels. Cf. "Die Freiheit der Sciffart," s. 66, Galiani, l. i. introduction, p. 4, n. 1. Cf. also the prohibition contained in the recess of the Hans Towns of 1417. 'Maarperger neuerröffnetes Handelsgericht,' p. 175."[1] Grotius treats the topic of contraband as one regulated by natural law, considering that instituted law was silent on the question. In two passages[2] Grotius adduces, as his custom is,[3] innumerable examples. One of his precedents may remind us that the Corcyreans held the same view of foreign enlistment that Vattel does, since they contended that the Corinthians ought not to raise troops in Attica without the consent of the Athenians. The precedents quoted by Grotius from Greek and Roman history induce the conclusion that among the ancients, the conveyance of contraband was universally considered to be incompatible with neutrality. Nor does modern international law conflict with those opinions, inasmuch as they are all cases of the neutral State, and not its subject, furnishing provisions or money to a belligerent. According to the whole current of authority, this constitutes a breach of neutrality by the neutral State, giving rise to reprisals or war. The history of the subject in the later Middle Ages is discussed by Grotius in a note of some length. He says, "In modern times the book 'Consolato del Mare' was published in Italian, and contains the constitutions of the Emperors of Greece and Germany, the Kings of the Franks,

Early prohibitions of the practice.

Views of Grotius.

History of the subject in the Middle Ages.

[1] "Law of Nations," by G. F. Von Martens, (1802) book viii. c. 6, s. x. ii., pp. 331, 332.

[2] "De Jure Belli et Pacis," lib. iii., c. xvii. s. 3; "De His. Qui in Bello Medii sunt;" and id. lib. iii. c. i. s. 5, "Quantum in Bello liceat, Regulæ Generales ex Jure Naturæ."

[3] Sir H. Maine, Lecture vii., p. 125.

of Spain, Cyprus, the Balearic Isles of the Venetians and of the Genoese. In tit. 274 of this book,[1] controversies of this kind are treated; and the rule given is this, that if the ships and lading both belong to the enemy, the matter is plain, and they become the property of the captors. If the ship belong to a neutral, the goods to an enemy, the belligerent may compel the ship to go into a port of his own, paying the navigators for the freight. If, on the other hand, it is an enemy's ship with the goods of a neutral, the ship is to be ransomed, and if the navigators refuse this, they may be taken into a port of the captors, and the captor must be paid for the use of the ship.

In the year 1438, when the Hollanders were at war with Lubeck and other cities on the Baltic and the Elbe, they decided in full Senate that goods of neutrals found in the enemy's ship were not good prize, and that law was afterwards maintained. So also in 1597 the King of Denmark judged, when he sent an embassy to the Hollanders and their allies, asserting for his subjects the right of carrying goods into Spain, with which the Hollanders were then in fierce war. The French always permitted neutrals the right of carrying on commerce with those who were the enemies of France, and so indiscreetly that their enemies often covered their goods with neutral names, as appears by an edict of 1543, c. 42, which was copied again in an edict of 1584 and the following year. In those edicts it is plainly declared that the friends of the French shall be allowed to carry on commerce during war, provided that they do it with their own ships and their own men; and that they may land where they please, provided that the goods are not munitions of war; but if these are carried, it is declared to be lawful for the French to take such goods, paying a fair price for them. Here we note two points, that even munitions of war were not declared prize, still less goods of a peaceful character. I do not deny that the northern nations asserted other rules but variously, and rather for an occasional purpose than as a permanent rule of equity; for

[1] It may be remembered that the reply of the English lawyers to the Prussian Exposition du Motifs, 1753, on the Silesian loan, which Historicus conjectures was drawn up by Lord Mansfield, speaks of "Il Consolato del Mare" as a "book of great authority," "Collectanea Juridica," vol. i. piece v.

when the English, under pretence of their wars, had interfered with the Danish commerce, a war arose between these two nations, of which the event was that the Danes imposed tribute in England, which under the name of the Dane's penny remained, although the alleged reason was changed at the time of William the Conqueror, the founder of the present dynasty in England, as Thuanus notes in the history of 1589. Again, Elizabeth, the sagacious queen of England, sent in 1575 Sir W. Winter and Robert Beal, Secretary of State, to Holland to complain that the English could not allow the Dutch in the heat of war to detain, as they had done, English ships bound to Spanish ports. So Reidan relates in his Batavian history at the year 1575, and Camden at the following year. But when the English had themselves gone to war with the Spanish, and interfered with the rights of German cities to sail to Spain, how doubtful the right was by which they did this appears from the above arguments of both nations, which deserve to be read for the purpose of understanding the controversy. And it may be noted that the English themselves acknowledge this, since the two main arguments which they allege are, that what the Germans carried into Spain were munitions of war, and that there were old conventions which prohibited such an act. And conventions of this kind were made by the Hollanders and their allies, with the Lubeckers and their allies in the year 1613, to the effect that neither party should permit the subjects of an enemy to traffic in their country, nor should assist the enemy with soldiers, ships, or provisions. And afterwards, in 1627, a convention was made between the kings of Sweden and Denmark to the effect that the Danes should prevent all commerce with the Dantzickers, the enemies of the Swedes; and should not allow any merchandize to pass the Sound to the other enemies of the Swedes, for which terms the King of Denmark stipulated in turn certain advantages to himself. But these were special conventions, from which nothing can be inferred which is binding upon all, for what the Germans said in this declaration was, not that all merchandise was prohibited by this convention, but that only which was once carried to England, or made in England. Nor

were the Germans the only party who refused to acknowledge the doctrines of the English, forbidding commerce with the enemy. For Poland complained by her ambassador that the laws of nations were infringed when, on account of the English war with Spain, they were deprived of the power of trafficking with the Spanish, as Camden and Reidan mention, under the year 1597. And the French, after a peace of Vervins with Spain, when Elizabeth of England persisted in the war, being requested by the English to allow their ships going to Spain to be visited, that they might not privily carry munitions of war, would not permit this, saying, that the request, if granted, would be made a pretext of spoliation and disturbance of commerce. And in the league which the English made with the Hollanders and their allies in the year 1625, a convention was indeed made that other nations, whose interest it was that the power of Spain should be broken, should be requested to forbid commerce with Spain; but if they would not agree to this, that their ships should be searched to see whether they carried munitions of war, but that beyond this neither the ships nor the cargoes should be detained, nor that any damage should be done to neutrals on that ground. And in the same year it happened that certain Hamburghers went to Spain in a ship laden for the most part with munitions of war, and this part of the lading was claimed by the English, but the rest of the lading was paid for. But the French, when French ships going to Spain were confiscated by the English, showed that they would not tolerate this. Therefore, we have rightly said that public declarations are required. And this the English themselves saw the necessity of, for they made such public declaration in 1591 and 1598, as we see in Camden. Nor have such declarations always been obeyed, but times, causes, and places have been made grounds of distinction. In 1458 the city of Lubeck refused a notice given them by the Dantzickers, that they were not to trade with the people of Malmoye and Memel. Nor did the Hollanders in 1551 obey, when the Lubeckers gave them notice to abstain from traffic with the Danes, with whom they were then at war. In the year 1552, when there was a war between Sweden and Denmark, when

the Danes had asked the Hanseatic cities not to have commerce with the Swedes, some of the cities who had need of their friendship conformed to this, but others did not. The Hollanders, when war was raging between Sweden and Poland, never allowed their commerce with either nation to be interdicted. The French always restored the Dutch ships which they took either going to or coming from Spain, then at war with them. See the pleading of Louis Servinus held in 1592 in the case of the Hamburghers. But the same Dutch did not allow the English to carry merchandise into Dunkirk, before which they had a fleet, as the Dantzickers in 1455 did not allow the Dutch to carry anything into Konigsberg."[1]

It is clear from this passage of Grotius that, according to the practice of the Middle Ages, the right of a belligerent to intercept contraband *in transitu* was very far from established. Sir H. S. Maine observes: "From the very beginning of international law a belligerent has been allowed to prevent a neutral from supplying his enemy with things capable of being used immediately in war."[2] Little more than a quarter of a century before the appearance of Grotius' work this could not be said, since he expressly states that after the peace of Vervins the French unequivocally refused to allow their ships to be searched for munitions of war when Elizabeth was at war with Spain. Again, the edicts of France in 1543 and 1584 did not confiscate even munitions of war. Pothier, who wrote at a time when the law was quite settled, commented on the common tendency to confuse enemy goods on neutral vessels, neutral goods in enemy vessels, and contraband goods in neutral vessels.[3] Since the Declaration of Paris, 1856, all these difficulties except contraband have been removed. But the early history of the subject, as detailed even by Grotius, fails sufficiently to distinguish between munitions of war and enemy property, as appears by his reference to "Il Consolato

[1] Note to Hugo Grotius' "De Jure Belli et Pacis," lib. iii. c. i. s. 5, accompanied by an abridged translation by William Whewell, D.D., Master of Trinity College, and Professor of Moral Philosophy in the University of Cambridge, with notes of the author, Barbeyrac, and others, vol. iii. pp. 9, 10, 11, 12. This note of Grotius is considered so important by Dr. Whewell that he translates it.

[2] "International Law," Lecture v., p. 105.

[3] "Traité du Droit de Propriete," l. i. part i. c. ii. s. 2, Art. 2.

de Mare." Again, under the treaty referred to by him between Sweden and Denmark, the object was to totally prohibit commerce, quite another thing from prohibiting contraband transactions. Grotius alludes to "old conventions" between the Hanseatic cities and England, and Holland with the Lubeckers, under the terms of which the contracting parties bound themselves, when one of them was at war, not to supply munitions of war to their enemy. This seems to imply that the belligerent right to intercept contraband *in transitu* depended on conventions, and from what Grotius further adds, it was requisite there should be declaration (*publicæ significationes*). These declarations are not declarations of war, for which the term used by Grotius is *denuntiatio*.[1] Apparently, therefore, the *publicæ significationes* of Grotius correspond to the contraband regulations of the modern state; at all events, they are equally unavailing to bind neutrals.[2] Even when there are conventions and declarations it does not appear that Grotius held the right of a belligerent to intercept contraband *in transitu* to be indubitable, since he expressly says that nothing can be inferred from special conventions which is binding upon all. It is inconsistent with the derivation of the belligerent right from natural law, and the observation that instituted law is silent on the subject, to conclude that Grotius derived it from conventions. There is a whole volume of treaties on the subject of contraband.[3] But these are after the date of Grotius, who lived in an age of land wars,[4] and the doctrine of contraband is exclusively a branch of the maritime law of belligerency.[5] Hautefeuille, who has examined the subject at great length,

[1] "De Jure Belli et Pacis," lib. iii. c. ii. ss. 67.

[2] Cf. Note of Grotius to "De Jure Belli et Pacis," c. iii. c. i. s. 5, cited above as to the effect of *significationes publicæ*. But Von Martens considers the declarations, issued by a belligerent advertising neutrals, that they shall look upon such and such declaration as contraband, as only dating from 1681, when Louis XIV. set the example. "Law of Nations," 1802, book viii. c. vi. s. 12, pp. 331, 332.

[3] Cf. Phillimore's "International Law," vol. iii. pp. 380, 381.

[4] Sir H. S. Maine, "International Law," Lecture vii., p. 123.

[5] Cf. the important inference deduced from this fact by MM. Pistoye and Duverdy, the commentators on Valin, "Traité des Prises Mar.," t. i., pp. 394, 395, to the effect that consistency demands that the sale of contraband on neutral territory should be prohibited. It would then be prohibited as much between States with contiguous territories as between those separated by the sea.

observes that few treaties anterior to the seventeenth century contained categories of contraband of war.[1]

Grotius' division the natural framework of the subject.

In view of this fact Grotius' definition and classification of contraband illustrate the Greek saying, that what has once been well said, does not admit of being said again. In a long note to the case of the *Franklin*, (1801) 3 Rob. 217, 222, it is pointed out that Grotius did not particularly discuss the case of a ship carrying contraband. It constitutes, therefore, the greater tribute to his sagacity that "the division (of the subject of contraband) which was made by him still remains the natural framework of the subject,"[2] although both precedent and authority were wanting to him.

He placed all commodities under three heads. "There are some objects," he says, "which are of use in war alone, as arms; there are others which are useless in war, and which serve only for purposes of luxury; and there are others which can be employed both in war and peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessaries of war. The second class of object gives rise to no dispute. With regard to the third kind, the state of war must be considered. If seizure is necessary for the defence, the necessity confers a right of arresting the goods, under the condition, however, that they shall be restored unless some sufficient reason interferes.[3]

Various causes have enhanced importance of topic of contraband.

The observation of Grotius that the state of the war must be considered in estimating whether articles become contraband under the third head, when examined in relation to Lord Stowell's generalization, that wars show a tendency to become more and more naval, throws some light upon the controversy between the Northern Powers and Great Britain on the subject of naval stores. Mr. A. J. Balfour pointed out in the House of Commons that there are many more important navies in the world than there were a quarter of a century ago.

The tendency which Lord Stowell observed may fairly be

[1] "Des Droits and des Devoirs des Nations Neutres en temps de Guerre Maritime," t. ii. p. 318.

[2] Hall's "International Law," 5th ed., p. 640.

[3] "De Jure Belli et Pacis," l. iii. c. i. s. 5.

said to have culminated in our day, and with it the acuteness of the controversy as to what is and what is not contraband. It is usual to designate the articles in the first and third classes of Grotius as absolute and conditional or relative contraband (*contrebande relative* or *par destination*, Fr.) respectively. In the first case the article is confiscated, in the second the carrier loses freight and expenses, and the belligerent exercises his right of pre-emption. The subject of the penalty will be later discussed. It is here sufficient to observe, as showing the severity of the Russian law of prize instanced in the Russo-Japanese War, that this Power classes coal and provisions as absolute contraband, and during the Crimean War confiscated ship and cargo in all cases.

Vattel's definition of contraband.

Vattel observes, "Commodities particularly useful in war and the importation of which to an enemy is prohibited are called contraband goods. Such are arms, ammunitions, timber for shipbuilding, every kind of naval stores, horses—and even provisions, in certain juncture, when we have hopes of reducing the enemy by famine."[1] Sir H. S. Maine noted that "changes in the structure and mode of propulsion of ships tend to make timber and other articles of that sort obsolete for contraband purposes. Steam renders sails of little utility and diminishes their number. The hulls are now more and more made of iron, and iron wire even takes the place of cordage.[2] But the British Admiralty Manual of Prize Law, 1888, makes not only ship-timber, considered contraband by Vattel in 1758, absolute contraband, but also hemp and cordage. Besides absolute and conditional or relative contraband, it is customary in modern times to speak of "Analogues of Contraband" (*Contrebande Accidentelle*). Such are despatches and persons of a military character. Upon the subject of definition and classification it may be advisable to recur to Sir R. Phillimore's division. According to him, absolute contraband is constituted of articles *bellici usus;* relative, of articles *ancipitis vel promiscui usus*, and contraband *per accidens*. Contraband *per accidens* is a term devised

Progress of shipbuilding completely changed character of materials.

Sir R. Phillimore's division of the subject for purposes of exposition.

[1] "Droits des Gens," livre iii. c. vii. s. 112.

[2] "International Law," Lecture vi., p. 114.

by continental jurists.[1] It is proposed to adopt the arrangement under which Phillimore discusses the subject :—

1. The carrying of unquestionable munitions of war, military or naval, in their perfected and completed state.

2. The permitting the sale of such articles to a belligerent within the territory of the neutral.

3. The carrying of material of a kind which does not certainly indicate whether their destination be for belligerent or ordinary commercial purposes. Articles *ancipitis vel promiscui usus*, especially of *commeatus*, provisions, and money.

4. The doctrine of pre-emption.

5. The carrying of military persons in the employ of a belligerent, or being in any way engaged in his transport service.

6. The carrying of the despatches of a belligerent.

7. The penalty of carrying contraband.

8. The principal treaties upon the subject of contraband.

Conveyance by a neutral to a belligerent of articles absolutely contraband.

1. The carriage of munitions of war is penalised by international law.[2] The Ordonnance de la Marine of Louis XIV. may be cited as a public instrument by which munitions of war were declared contraband. The Ordonnance provided by the Eleventh Article: "Les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages, qui seront confisqués en quelque vaisseau qu'ils soient trouvés, et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés."[3] Wheaton[4] and Hautefeuille[5] allude to the Treaty of Utrecht, 1713, as confining the list of contraband strictly to munitions of war. The commercial treaty provided, "On comprendra sous le nom des marchandises de contrebandes or defendues, les armes, canons, arquebuses, mortiers, petards, bombes, grenades, saucisses, cercles poissez, affuts, fourchettes, bandouliéres, poudre à canon, mesches salpetre, balles, piques, espees, morions, casques, cuirasses,

Prohibited by the Ordonnance of Louis XIV.

By the Treaty of Utrecht, 1713.

[1] Phillimore, vol. iii. s. 243.

[2] Hall's "International Law," p. 640; Sir H. S. Maine's Lecture, "International Law," p. 105.

[3] "Noveau Comment., sur l'Ordonnance," etc., t. ii. p. 264; and cf. Wheaton, p. 650.

[4] "International Law," p. 653.

[5] "Des Droits et des Devoirs des Nations Neutres en temps de Guerre Maritime," t. ii. titre viii. s. 3, p. 321.

hallebardes, javelins, fourreaux de pistolets, baudriers, chevaux avec leurs harnais, et tous autres sembables genres d'armes et d'instrumens de guerre, servant a l'usage des troupes." The treaty of the Pyrenees, 1759, between France and Spain, also confined contraband to munitions of war. The classing of munitions of war as contraband is the irreducible minimum of the whole subject. Phillimore observes that no Hübner, no professed advocate of neutral claims, has as yet maintained a contrary position to that stated by Lord Grenville, "If I have wrested my enemy's sword from his hands, the bystander who furnishes him with a fresh weapon can have no pretence to be considered as a neutral in the contest." [1] Grotius says, "Verum est dictum . . . in hostium esse partibus qui et bellum necessaria hosti administrat." [2]

Sale of contraband articles on neutral territory whether prohibited.

2. As to permitting the sale of such munitions to a belligerent within the territory of the neutral. This is the topic on which Historicus wrote his letters. The Conference of Geneva, 1872, has hardly impaired the future value of his arguments, though it declared that a neutral subject may not sell a ship to a belligerent. The subject is elsewhere discussed: it is here only necessary to remark that at present the Treaty of Washington cannot be said, in view of the general non-accession to its principles, to have definitely established an exception to the principle which Historicus contended was the unanimous sentence of Bynkershoek, Vattel, Lampredi, Azuni, Wheaton, Kent, Ortolan, Story, Martens, Kluber, and, finally, that of the Supreme Court of the United States." [3]

Opinion of Historicus.

Contraband trade, *contra bonos mores. Que.*

In *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 476, it was argued that contraband trade was *contra bonos mores.* Historicus pointed out that no decided case had established the validity of the contract of insurance on contraband goods, and that a policy of marine insurance on goods whose transport involved a breach of blockade was invalid. But decisions delivered shortly after the letters of Historicus appeared have established that, by English law, "the carriage of contraband

[1] "Letters of Sulpicius," p. 26.

[2] "De Jure Belli et Pacis," l. iii. c. i. s. 1.

[3] Letters, "International Law," Neutral Trade in Contraband of War, p. 130.

goods, or voyages in breach of blockade, are not considered illegal; and it necessarily follows that insurances on such goods or voyages are not illegal" (Arnould's Mar. Ins., s. 760, referring to *ex parte* Chavasse, *In re* Grazebrook, *per* Lord Westbury (1865), 34 L. J. Bank 17; the *Helen* (1865), L. R. 1 A and E 1, and also earlier American decisions). This had a material bearing on his argument that the conveyance of contraband goods was not prohibited by municipal law, and possibly not by international law, as it was a mere case of the conflict of rights. By the laws of some other European countries a policy of insurance on contraband goods is null.[1] In all these cases insurances upon ships and goods engaged in contraband trade are void.[2] The case of the *Ruys* v. *Royal Exchange Assurance Corporation* (1897) shows that a policy of insurance on contraband goods is valid by the law of England. By the Customs Consolidation Act (Stat. 42 & 43 Vict. (1879), part 1, s. 8) the exportation of contraband articles may be prohibited by proclamation or Order in Council under the penalty of forfeiture of goods exported. Further, the agent or shipper of such goods is liable to a fine of £100. The Prussian Government has incorporated in its Code of Municipal Law an article prohibiting the carriage by its subjects to any other nation of contraband, consisting of munitions of war, or of articles forbidden by treaties of the nation to whom it is carried.[3] It seems clear that this provision, which was in force at the time of the Crimean War, was infringed and evaded as much as the Foreign Enlistment Act, 1819, was infringed during the American Civil War, 1861–64.[4] It is too soon to say whether Japan will insist on her belligerent rights in 1904 as the United States insisted in 1871, as far as the sale of vessels of war is concerned.[5] The subject has been elsewhere discussed. It is sufficient to say here that Phillimore,[6]

Policy of insurance on contraband transaction valid by law of England.

But trade in contraband may become illegal.

[1] Cf. "Maritime Code of Holland, Marine Insurance," Art. 599, c. iv.; Spanish Code, Art. 781, ss. 4; Portuguese Code, Art. 600, ss. 3.

[2] Cf. "Maritime Codes," by His Honour Judge Raikes; Effingham Wilson, 1896.

[3] "Preussisches Landrecht," B. ii. s. 2034, p. 416.

[4] Phillimore, vol. iii. s. 210.

[5] Cf. Article on "International Law and the War," by Sir J. Macdonnell, *Nineteenth Century Magazine*, July, 1904, p. 146.

[6] "International Law," vol. iii. ss. 230–233.

Writers who would prohibit the sale of contraband articles on neutral territory.

Hautefeuille,[1] Galiani,[2] Pistoye and Duverdy[3] consider that a neutral State is bound to prohibit the sale of contraband on its own territory, a view which constitutes the *Ultima Thule* of neutral obligation.

The conveyance of relative or conditional contraband.

3. The carrying of materials of a kind which does not certainly indicate whether their destination be for belligerent or ordinary commercial purposes—*res ancipitis vel promiscui usus.*

It is proposed to discuss the question here from the point of view of the authoritative writers, from the judgments of Lord Stowell, and from unilateral acts, such as naval regulations and commercial codes of different countries. The subject will be discussed from the point of view of treaties later.

Views of Grotius.

Grotius says on this head that the conditions of the war are to be considered. "For if I cannot defend myself except by intercepting what is sent, necessity, as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this—as if I were besieging a town, or blockading a port, and if surrender or peace were expected—he will be bound to me for damages, as a person would who liberates my debtor from prison or assists his flight to my injury: and to the extent of the damage, his property may be taken and ownership thereof be assumed for the sake of recovering my debt. If he have not yet caused damages, but have tried to cause it, I shall have a right by the retention of his property to compel him to give security for the future by hostages, pledges, or in some other way. But if, besides, the injustice of my enemy to me be very evident, and he confirms him in a most unjust war, he will then be bound to me not only civilly for the damage, but also criminally, as being one who protects a manifest criminal from the judge who is about to inflict punishment: and on that ground it will be lawful to take such measures against him as are suitable

[1] "Des Droits et des Devoirs des Nations Neutres," t. ii. tit. viii. s. 3.

[2] "De' Doveri de' Principi Neutrali verso i Guerregianti, e de questo verso i Neutrali," c. ix. s. 4.

[3] "Traité des Prises Mar.," t. i. pp. 394, 395.

to the offence, according to principles laid down in speaking of punishment, and therefore to that extent he may be subject to spoliation."[1] Grotius gives previously as examples of articles *ancipitis vel promiscui usus*, money, provisions, ships, and their furniture.

Phillimore observes that Bynkershock[2] "justly rejects the opinion of Grotius so far as it relates to any distinction between the justice and injustice of a war." It is clear, however, that Vattel was in the habit of drawing this distinction.[3] Bynkershoek came to the conclusion that warlike instruments and all things capable of use in war were contraband. But he drew a distinction between *materia* (1) *per se bello apta;* (2) *ex qua quid bello aptari possit.* To interdict the last-named as contraband, he observes, would be a total prohibition of all commerce, and it might be as well so expressed and understood. The fact that Bynkershoek excepted raw materials from the category of contraband suggests that he cannot be considered universally a great champion of belligerent rights, as he was described by Historicus. The arguments of Bynkershoek from treaties on this subject are severely criticized by Sir R. Phillimore.[4] He relied on two treaties between the Swedes and Dutch in 1675 and 1679, and one between the English and Dutch in 1674, as constituting the semblance of a general custom excluding the materials, out of which contraband goods are formed, from the category of contraband. Elsewhere he admits that one or two treaties, which vary from the general usage, do not alter the law of nations.[5] Phillimore observes that nobody was better aware than Bynkershoek that three treaties are quite insufficient to constitute the semblance of a general custom. Again, he cites three edicts of the Dutch in the seventeenth century pronouncing raw materials contraband, which he summarily pronounces exceptions. Bynkershoek devotes a considerable discussion to the question whether saltpetre ought to be admitted in the catalogue of contraband articles. Prince Bismarck, it would appear,

View of Bynkershoek.

[1] "De Jure Belli et Pacis," l. iii. c. i. s. 5. [2] Q. J. P. c. x.
[3] "Droit des Gens," book iii. c. x. s. 180.
[4] "International Law," vol. iii. s. 236. [5] Q. J. P. l. i. c. x.

regarded the retention of saltpetre in the lists of contraband as being objectless under the conditions of modern war.[1] Notwithstanding these doubts, saltpetre always has been considered contraband, being in Bynkershoek's time considered as synonymous with gunpowder.

Views of Zouch.

Zouch, the English authoritative writer on international law, argues the question upon first principles. On the one hand, he says, it may be contended that the law of contraband, being of a penal character, is not to be extended beyond its strict meaning, and the argument from the prohibition of a composite thing to the prohibition of the elements of which it is compounded is illogical. On the other hand, it consists with sound reasoning to say that where the reason for the prohibition of both is applicable, the law is equally applicable to both ("ubi est eadem ratio prohibitionis, materiæ et speciei, idem jus in utraque censendum est"), especially when the object is to prevent fraud; and therefore it was that in the Roman law the famous Senatus Consultum Macedonianum, when it forbade loans to a minor, forbade also the things for which money could be procured, *cum contractus fraudem sapit.* So it is according to the *jus commune* that when weapons made of iron are pronounced to be contraband, the iron of which they are made should fall under the same ban.[2]

Views of Heinneccius.

Heinneccius, considered by Bynkershoek and Phillimore to be the principal writer on the subject of conditional contraband, observes, "Sometimes it is of great importance—in wars even things of the smallest importance acquire importance—if the enemy is labouring in want: nor is there elsewhere any resource for things of the kind required. Often strongly fortified cities experience the want of fuel, or of burnt wine, and the soldier of the garrison more readily endures thirst than the want of these things. Who, therefore, denies it? Both citizens and foreigners deserve badly of the Republic, who render such things to our enemies, without which they should have been easily reduced to surrender. But it is still true that in time of war, not only does commerce cease between enemies, but

[1] See quotation in "Geffcken," Holtzendorff's Handbook, iv. 723.

[2] "Juris et Judic. Fecial," Quaest. Pars. 2, s. 8.

even intercourse with friends and with peoples of neutral position cannot be freely permitted with the enemy (unless the former stipulate for security from both belligerents). For since everything is lawful indefinitely for one belligerent against the other which is necessary for prosecuting war, it will clearly be lawful to obstruct even a friendly nation from carrying things to the enemy by means of which his circumstances may be rendered more secure and more suited to conduct war." [1]

In another passage Heinneccius says, "It has been established by several treaties between States what goods it is considered wrong to convey to an enemy. On this subject there are extant treaties of the King of Spain with the Belgians, of the King of France with the Hanseatic States, with the Dutch, of the English with the Poles and the Swedes, and several others of the like kind, in which we observe that all arms of an explosive character are classed with prohibited goods, and their apparatus, such as engines for hurling missiles, bombs, mortars, petards, powders, balls of pitch, carriages for guns, forks, bandoliers, nitrate powder, ropes fit for catching fire, nitrate of salt, fire-balls, so also spears, swords, helmets of leather or metal, breastplates, battle-axes, spikes, horses, saddles, and other warlike instruments. Nay, also wheat, barley, oats, pulse, salt, wine, oil, sails, ropes, and everything else connected with fitting out ships. . . . But there are some things concerning which there has been some difference between States, whether they are to be considered in the category of prohibited articles. There has been some doubt as to sword sheaths. . . . . Sword sheaths are not less necessary to a belligerent than swords; and although he may not wound with a scabbard, or deal out slaughter with it, yet the swords themselves would be rendered useless unless the scabbards protected them from rain and rust. Therefore, the very same reason that impels to the prohibition of sails, ship-ropes, corn, easily admits of being applied to scabbards themselves." [2]

[1] "De Jur. Princ. circ. Com.," s. 12.

[2] "De Navib. ob. Vect. Merc. Vetit. Comm.," xiv.

Heinneccius was a privy councillor of the King of Prussia, a circumstance which renders it remarkable that he should have included in the category of contraband naval stores and provisions of every kind. In spite of his position, his writings do not seem to have inspired the policy of his country. The category of contraband as stated by Heinneccius is far more extensive than any adopted by Great Britain, though it may exhibit a counterpart to the Russian naval regulations of 1904. It is difficult to refrain from commenting on the indecisive and almost puerile discussion instituted by Bynkershoek and Heinneccius as to whether scabbards are contraband. The serious issue of the subject is whether, under the pretext of contraband, all commerce between maritime nations shall be interdicted. Heinneccius, after practically interdicting all commerce between the neutral nations and a belligerent, enters with zest upon the discussion whether a neutral should sell scabbards to a belligerent.

Opinion of Hübner, the great champion of neutrality.

Phillimore speaks slightingly of Hübner's "De la Saisie des Batimens Neutres." Nevertheless, this writer merely enunciates a principle of Vattel when he says that the only duty of the neutral is to be *in bello medius*, and not to refuse to one belligerent what he grants to another.[1] Hübner gives a long list of contraband, and attempts to make a "fixation de la contrebande de guerre au premier et au second chef." "Contrebande au premier chef" includes the class of goods useful only for war, and some of those *ancipitis usus*, but only when supplied to besieged or blockaded places. "Contrebande au second chef" includes articles of both classes which are furnished to one belligerent and refused to another. Ward[2] observes that the conclusion of Hübner's long argument is that none of the things in his long catalogue can ever become contraband at all, so long as the neutral is content to furnish both belligerents with them at the same time. Sir R. Phillimore[3] considers that Hübner's views have neither reason nor usage to recommend them.

In *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 508,

[1] Cf. Bynkershoek, Q. J. P., l. i. c. ix.; Vattel, "Droit des Gen," l. iii. c. 7.
[2] "Contraband," p. 180. [3] "International Law," vol. iii. s. 241.

Pollock, C.B., observed that jurists differed widely from each other on the subjects of belligerent rights and neutral duties, and even generally on international law. But since the date of this case and the Geneva Conference, the Institute of International Law has been founded, and "professors of, and writers on, international law have done a great deal towards rendering doctrine harmonious and consistent."[1] The Hague Conference must be added to the other instances adduced by Mr. W. E. Hall when the body of civilized nations have united in prescribing general rules of international conduct. The fact that a powerful belligerent like Russia should have modified her regulations in deference to neutral representations is a feature of good omen in international law, and none the less that the concession was made during a contest which was marked by patent derelictions from the highest standard of either belligerent right or neutral duty.

It is quite impossible to deduce any general law of contraband from treaties, since for the last fifty years there have been repeated instances of the same nation concluding treaties in a different sense on the subject with different States at the same time.[2] But Grotius seems to derive the belligerent right of stopping contraband *in transitu* from treaties or "old conventions." The remedial branch of the law of contraband may thus be based on treaty law.

Loccenius.

Loccenius comprehends provisions generally in his class of contraband.[3] In the "Encyclopædia of Laws" it is stated,[4] "In the domain of theory there are two distinct tendencies. Jurists belonging to the maritime powers, jealous of their belligerent rights, tend to sustain the existing uncertainty. Those who belong to the weaker and neutral States would restrict contraband to a limited number of articles."

Whether balance of naval power cause of variance in contraband lists. *Que.*

This generalization does not apply to the authoritative writers. Bynkershoek wrote before Holland lost her maritime supremacy.[5] Yet, as has been seen, he considered that

[1] Hall's "International Law," Introduction.

[2] Cf. Phillimore's "International Law," vol. iii. p. 345, and "Encyclopædia Laws of England," art. "Contraband."

[3] "De Jure Marit.," l. i. c. iv. n. 5, p. 41.

[4] p. 5, art. "Contraband."

[5] Cf. Hall's "International Law," p. 644.

materials out of which contraband goods are formed are not contraband, and herein puts neutral rights on their highest footing. Historically, Prussia has always been a weak naval Power. But Heinneccius, who was a Prussian privy councillor,[1] regarded every species of provisions as unconditionally contraband. Again, Zouch, the English authoritative writer on international law, does not approach in severity the views of Heinneccius. While Zouch considered ship-building materials contraband, he does not, like Heinneccius, include every class of provisions, as well as naval stores, in the category of contraband. Further, while Heinneccius classed ship-building materials as unconditionally contraband, Zouch evidently only considers them contraband by destination, laying down that their seizure can only be justified where there is fraud. Again, Hautefeuille is, perhaps, the writer who has, in modern times, advocated with most detail the inclusion of mere munitions of war as contraband. But in 1848, when Hautefeuille's work appeared, France, though in the throes of revolution, could not be called a weak neutral Power.[2]

Proposals of "l'Institut du Droit International," 1896, to abolish relative contraband.

In the domain of theory, the last word on the subject seems to be that of the "Annuaire de l'Institut du Droit International," 1896, p. 230, where it is proposed to do away with "les pretendues contrebandes désignées sous le noms, soit de contrebande relative, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligerent dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande accidentelle, quand les dits articles se servent specialement aux buts militaires que dans une circonstance particulière." The right of pre-emption, however, is reserved to the belligerent in the case of objects *ancipitis usus* seized while *in transitu* towards a port of his adversary. Lord Reay, in presiding at the recent session of the

But right of pre-emption reserved in case of objects *ancipitis usus*.

[1] "Collectanea Juridica," vol. i., piece v.

[2] Sir H. Maxwell's "Life of the Duke of Wellington," vol. ii. pp. 359, 363; "Earl Stanhope's Conversations," p. 314; whence it appears that about this date the Duke of Wellington had considerable apprehension of invasion, and declared that England could not afford to protest against the Spanish marriages of the sons of Louis Philippe.

Institute of International Law, alluding to the subject of contraband of war, said that in 1896, at Venice, the Institute laid down rules on contraband which had been of a far-reaching character. It only recognized five categories of articles as being absolute contraband when carried by sea at the cost of a belligerent, and to the destination of a belligerent. Accidental and relative contraband were not recognized, but a belligerent had the right of sequestration or pre-emption of articles which might be useful for warlike as well as for peaceful purposes. In 1895 the committee had proposed the following rules:—

Articles which can be of use both for warlike and for pacific purposes are not, in general, to be considered contraband. They can be considered such if they are immediately and specially intended for the military or naval forces or for military operations of the enemy, if they have been included in a previous declaration issued by the belligerent Government at the commencement of the war, in accordance with Clause 30 of the rules adopted by the Institute with regard to maritime prizes in 1882. The Institute had given to neutrals a greater immunity than they could claim in accordance with the well-established practice of international law, which admitted the rights of a belligerent to proclaim what it considered absolute and relative or accidental contraband. An international conference should meet to deal with the subject of contraband in order that the difficulties might be avoided which arose after declaration of war, and which were the result of the right claimed by a belligerent to give his own interpretation of the character of contraband.[1]

Prof. T. E. Holland.

Professor T. E. Holland, in a letter to the *Times*, March 12, 1904, observed, "Articles are 'contraband of war' which a belligerent is justified in intercepting while in course of carriage to his enemy, although such carriage is being effected by a neutral vessel. Whether any given article should be treated as contraband is, in the first instance, entirely a question for the belligerent Government and its prize court. A neutral Government has no right to complain of hardships which may thus be incurred by vessels sailing under its flag,

[1] *Times*, September 21, 1904.

but is bound to acquiesce in the views maintained by the belligerent Government and its courts, unless these views involve, in the language employed by Lord Granville in 1861, 'a flagrant violation of international law.' This is the beginning and the end of the doctrine of contraband. A neutral Government has none other than this passive duty of acquiescence. Its neutrality would not be compromised by the shipment from our shores of any quantity of cannon, rifles, and gunpowder."

It is now proposed to examine the question of conditional contraband from the view of English prize law as contained in the judgments of Lord Stowell.

Views of Lord Stowell.

In the famous case of the Swedish convoy, determined in the English Court of Admiralty in 1799, Sir W. Scott (Lord Stowell) states, "That tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations, though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty" (that is, the treaty of 1661 between Great Britain and Sweden, which was still in force when he was pronouncing this judgment), "or, at least, at the time of making that treaty which is the basis of it—I mean the treaty in which Whitlock was employed in 1656; for I conceive that Valin expresses the truth of this matter when he says, 'De droit ces choses' (speaking of naval stores) 'sont de contrebande aujourd'hui et depuis le commencement de ce siècle, ce qui n'etait pas autrefois néamoins;'[1] and Vattel, the best recent writer upon these matter, explicitly admits amongst positive contraband, 'les bois, et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.' Upon this principle was founded the modern explanatory article of the Danish treaty entered into in 1780, on the part of Great Britain by a noble lord (Mansfield) then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am, therefore, of opinion that although it might be shown that the

[1] Valin, "Comm. sur l'Ordon.," liv. iii. tit. 9, "Des Prises," art. 11.

nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and therefore a discreet silence concerning them was observed in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe had given upon this subject would, in some degree, affect and supply what the treaties had been content to leave on that indefinite and disputable footing, on which the nations then more generally prevailing in Europe had placed it."[1]

It is, however, objected to this decision by Wheaton (in the text, p. 651), that the treaty of 1661 made no mention of naval stores, and the subsequent treaties of 1664 and 1665 expressly declared that nothing should be contraband except what they made so, together with the treaty of 1661. The treaties of 1664 and 1665 were equally silent as regards naval stores. Mr. W. E. Hall observes that according to the opinion of Sir Leolin Jenkins, the chief English authority on international law in the latter end of the seventeenth century,[2] "articles of direct use for warlike purposes were alone contraband under the common law of nations, but that each State, in order to meet the special conditions of a particular war, possessed the right of drawing up at its opening a list of articles to be contraband during its continuance."[3]

The *Staadt Embden*, (1798) 1 Rob. 26, was the case of a prize ship taken from the English and carried into Christiansand, South Norway. A pretended sale had passed there, and the vessel was retaken on a voyage from Riga to Amsterdam, laden with deals and masts. It was adjudged on the facts that the vessel had become the property of the neutral. The vessel was captured in the first instance by a French privateer, and recaptured. Sir W. Scott observed, "Most clearly the masts are liable to be considered contraband in the judgment of the most zealous advocates of neutral commerce."[4] The circumstances of the case were very

[1] The *Maria*, 1 C. Rob. 372.
[2] "Life and Correspondence of Sir L. Jenkins," vol. xi. p. 751.
[3] "International Law," p. 642. [4] Ibid., *supra*.

peculiar, as the vessel was taken on a voyage from Riga, a Russian port, to Amsterdam, then considered a port in the possession of the French, and blockaded by a Russian and English fleet. Under these facts it was difficult to consider the cargo neutral. Sir W. Scott suggested a doubt which seems a little difficult to understand, saying, "An auxiliary fleet is not of itself sufficient to make its Government a principal in a war."[1] It therefore seems that the doctrine of pacific blockade is of far earlier origin than that usually assigned it in books on international law. The earliest instance of a pacific blockade usually adduced is the blockade in 1827 by France, Great Britain, and Russia of all the coasts of Greece occupied by Turkish forces.[2] But it seems quite clear from the words of Sir W. Scott in the *Staadt Embden*, (1798) 1 Rob. 26, 30, that the doctrine of pacific blockade has an earlier origin. A further fact of interest in this case is that in the event of recapture the practice of the prize court in Lord Stowell's time was to order the vessel to be sold, and to award the recaptors one-eighth of the proceeds as salvage. The *Staadt Embden* also decided that the relaxation of the principle of confiscating naval stores, when the stores were native produce, going to enemy's ports on account of the country which produced them, was not of absolute application. Lord Stowell referred to the solemn judgment of the Lords of Appeal in "the famous case" of *Med. Goods Hielp*, Soderberg, where a cargo of pitch and tar, going on Swedish (neutral) account to Port Louis, was condemned. Innocent articles are liable to be confiscated when they are found in the same ship as contraband, and they belong to the owner of the contraband.[3]

The *Twee Juffrewen*, (1802) 4 Rob. 242, decided that tar and pitch, not being the produce of the exporting country, are contraband. The *onus probandi* of showing that the articles are the produce of the exporting country lies on the claimant. The *Twee Juffrewen* was a Prussian ship, and claimed as the property of a Prussian merchant.

[1] "International Law," p. 30. [2] Wheaton, p. 415; Hall, 371.
[3] Bynkershoek, 12 Q. J. P., bk. i. c. 12.

In this case Sir W. Scott observed that the subject of the contraband character of naval stores continued a vexed question between Great Britain and the Baltic Powers throughout the whole of the eighteenth century.[1] He added, "With respect to what has been said of a different understanding prevailing in that country, I am afraid it is not the only instance in which our exposition of the law of nations differs from what they (*i.e.* Prussia) are inclined to hold upon the same article; but I must remember it is my duty to adhere to what I understand to be the exposition authorized by former decisions of this court, founded on general and disinterested views of the subject." [2]

But it is a curious fact that Heinneccius, a Prussian privy councillor, took the English view, and considered that anything of use in outfitting a ship was unconditionally contraband. Upon the particular point in issue in the *Twee Juffrewen*, Sir W. Scott observed, "I take it to be established doctrine of this court that pitch and tar are universally contraband, unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported, in which latter case they are considered on the lenient and modern application of the rule as subject to pre-emption only. In certain instances, where they constitute the great staple commodity of the exporting country, as of Sweden, the presumption may be allowed in favour of the claimant without absolute proof; but in respect to East Friesland, or any part of Prussia, the same presumption does not arise." [3]

In the *Apollo*, (1802) 4 Rob. 161, a question arose respecting a quantity of hemp, being the produce of Russia, and the property of a Russian merchant, taken on board a Prussian

[1] Wheaton's "International Law," p. 654.

[2] "*Twee Juffrewen*," (1802) 4 Rob. 242, 244; and cf. the observation of Gibbs, C.J., in *Taylor* v. *Curtis*, (1816) 6 Taunt. 608, 624, as to the differences between the English and foreign views of the law of general average, by which neither the wounds of the sailors defending a private armed vessel, nor the "wounds of the ship," in the case of the successful defence of a private armed vessel, form the subject of contribution in general average by the law of England. The observations of Pollock, C.B., in *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 508, as to the antinomies prevailing in international law on the subject of contraband, may also be compared with those of Lord Stowell in the *Twee Juffrewen* (*supra*).

[3] Ibid., *supra*, p. 243.

ship, on a voyage from Libau in Courland to Amsterdam. The cargo was restored on further proof that the hemp was the produce of Russia.

In 1801 England contracted a treaty with Russia, by which it was agreed not to consider as contraband the merchandise of the produce, growth, or manufacture of the countries at war which should have been acquired by the subjects of the neutral Power, and should be transported for their account. But Sir W. Scott held that the treaty did not apply, as the hemp was taken not in a Russian but a Prussian vessel. In these treaties commerce meant commerce connected with navigation. When, therefore, the treaty spoke of "neutral ships" it did not mean the vessels of any neutral State, but only those of the contracting parties. The question was decided apart from the treaty, which at this date, of course, is not in force. But the question which remained to be decided in the *Apollo* (*ubi supra*) was—"Whether hemp, being the produce and property of the country, was liable to confiscation?" The case of *Jonge Pieter*, Adm., November 12, 1781, Lords, 1783, was exactly parallel because it was also the case of a cargo of hemp on board a foreign ship. The effect of this and other cases was that the presence of the hemp in a foreign ship did not render it contraband if it could be shown that it was a staple commodity of the country of its owner. Sir W. Scott said, "Hemp is certainly liable to be considered as generally contraband; but in relaxation of the strict principle, the general rule now prevailing is that being the produce and property of the exporting country, and going in a vessel of that country, it is not liable to confiscation." The last circumstance being considered immaterial, it was regarded as a case for further proof, and the cargo was restored on its being shown that it was the produce of the country of the exporter.

Unilateral Acts declaring contraband.

It is now proposed to examine unilateral acts of different countries, defining the category of contraband and to compare them with the Russian and Japanese declarations regarding contraband issued on the commencement of hostilities. An interesting point bearing on the subject is mentioned in the

reply of the English lawyers to the Prussian Exposition de Motifs, issued in connection with the seizing of Prussian ships as a security for the Silesian loan, 1753. The Prussian lawyers alleged that Lord Carteret in 1744, by two verbal declarations, gave assurances to the King of Prussia in the name of the King of England that nothing on board a Prussian ship should be seized, except contraband; consequently, that all effects not contraband, belonging to the enemy, should be free; and that these assurances were afterwards confirmed in writing by Lord Chesterfield, January 5, 1747. The English lawyers replied that the verbal declarations of a minister in conversation might show what he thought to be the law of nations, but never could be understood to be equivalent to a treaty derogating from that law.[1]

Declarations of ambassador.

By the Mercantile Marine Code of Italy[2] it is provided that, "Unless otherwise agreed by treatise or by special declarations made at the commencement of hostilities, the following articles are declared to be contraband of war. Canons, muskets, carbines, revolvers, pistols, swords, as well as other firearms, whether such as can be carried or of any other description, munitions of war, military implements of all descriptions, and generally all things which, without manufacture, can be at once used for fitting out military or naval forces."[3] "The British Admiralty Manual of Prize Law," 1888, enumerates as absolutely contraband—Arms of all kinds and machinery for manufacturing arms, ammunition and material for ammunition, including lead, sulphate of potash, muriate of potash, chlorate and its materials, saltpetre and brimstone; also gun-cotton, military equipments and clothing, military stores, naval stores, such as masts, spars, ladders, and ship-timber, hemp and cordage, sail cloth, pitch and tar, copper fit for sheathing vessels, marine engines, and the component parts thereof, including screw propellers, paddle wheels, cylinders, cranks, shafts, boilers,

Mercantile Marine Code of Italy.

Raw materials not contraband.

"British Admiralty Manual of Prize Law," 1888.

[1] "Collectanea Juridica," vol. i. p. 152.

[2] "Neutral Rights," c. iii. Art. 216.

[3] Cf. "Maritime Codes of Italy," translated and annotated by His Honour Judge Raikes, ed. 1904.

tubes for boilers, boiler plates and fire bars, marine cement and the materials used in the manufacture thereof, as blue lias and Portland cement; iron in any of the following forms—anchors, rivet iron, angle iron, round bars of iron from $\frac{3}{4}$ to $\frac{5}{8}$-inch diameter, rivets, strips of iron, sheets, plate iron exceeding a quarter of an inch, and Low Moor and Bowling plates. Conditionally contraband—Provisions and liquors fit for consumption of army or navy, money, telegraphic materials, such as wire, porous caps, platina, sulphuric acid, and zinc; materials for the construction of a railway, as iron bars, sleepers, coals, hay, horses, rosin, tallow, timber.

The Prussian Prisen Reglement and Austrian ministerial *verorderungen* of 1864.

The Prussian Prisen Reglement of June 20, 1864,[1] the Austrian ministerial *verorderungen* of March 3, 1864, s. 7, and of July 9, 1866, s. 4, define contraband, the former as "all things which may be employed directly (*unmittelbar*) for the war;" the latter adds the exception of such reasonable provisions of prohibited articles as may be necessary for the ship's protection. The Japanese declaration regarding contraband in the present war, as transcribed from the *Times*, February 10, 1904, is as follows:—

Japanese declarations, Feb. 10, 1904.

First class: Military weapons, ammunition, explosives, and materials, including lead, saltpetre, sulphur, etc., and machinery for making them; uniforms, naval and military, military accoutrements, armour-plated machinery, and materials for the construction or equipment of ships of war, and all other goods which, though not coming under this list, are intended solely for use in war. The above-mentioned articles will be regarded as contraband of war when passing through or destined for enemy's army, navy, or territory.

Second class: Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, coins, gold and silver bullion, and materials for construction of telegraphs, telephones, railways. The above-mentioned articles will be regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy. Exception has been made as regards articles mani-

[1] Cf. Art. 8.

festly intended for use of vessels carrying them. Prize courts at Sasebo, Tokio.

Russian declarations regarding contraband, *Times*, March 1, 1904.

The following are the Russian regulations declared contraband which have recently acquired prominence in connection with the seizures of British ships :—Declared contraband of war : Arms, munitions, explosives, and substances used for manufacture of explosives; materials used for artillery, engineering, and baggage trains, such as gun-carriages, campaign kitchens, carts, barbed wire, pontoons, harness, etc.; articles of military equipment and clothing, ships constructed for purposes of war, boilers, and all kinds of ship machinery; every kind of combustible, such as coal, naphtha, alcohol, and similar substances; materials and objects for telegraphic and telephonic installations, or for construction of railways generally; all objects intended for war by sea or land, including rice, provisions, horses, etc. Assimilated to contraband are the following acts: Transport of enemy's troops, despatches, and correspondence, and furnishing transports and ships of war to the enemy. Neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated. Further, early in May the Russian Government issued an additional notification declaring cotton to be contraband.[1]

G. F. von Martens on history and force of belligerent declarations regarding contraband.

The following observations on the history and effect of belligerent regulations regarding contraband are of interest: "The maritime Powers have begun, especially since the latter end of the last century,[2] to issue declarations at the beginning of the war to advertise the neutral Powers that they shall look upon such and such merchandises as contraband, and to forewarn them of the penalties they intend to inflict upon those who shall be found conveying them to the enemy. These declarations are rather advertisements than laws; nor can their effect by any means be extended to these neutral Powers with which the powers that issue them have treaties of commerce." [3]

[1] *Times*, March 1, 1904.

[2] Louis XIV. set the example, 1681. See Henning's "Abhandlung der Neutralitat," p. 30. See another declaration, 1744, in Bouchard, "Theorie," p. 397.

[3] "Law of Nations," 1802, by G. F. von Martens, book viii. c. vi. s. 12, pp. 331, 332.

CHAPTER XIII—(*continued*).

PART IV.

CONTRABAND OF WAR.

It is proposed now to discuss what has been termed *Nobilissima Juris Gentium Quæstio*, viz. Whether ever, and if ever, under what circumstances, provisions are contraband?[1]

Professor T. E. Holland and absolute and conditional contraband.

Professor T. E. Holland, in a letter to the *Times*, elicited by the sinking of the *Knight Commander*, made the following observations: "A far more important question is, I venture to think, raised by the Russian list of contraband sweeping, as it does, into the category of 'absolute contraband articles' things such as provisions and coal, to which a contraband character, in any sense of the term, has usually been denied on the continent, while Great Britain and the United States have admitted them into the category of 'conditional contraband' only when shown to be suitable and destined for the armed forces of the enemy, or for the relief of a place besieged. Still more unwarrantable is the Russian claim to interfere with the trade in raw cotton. Her prohibition of this trade is wholly unprecedented, for the treatment of cotton during the American Civil War will be found on examination to have no bearing on the question under consideration. I touch to-day on this large subject only to express the hope that our Government, in concert, if possible, with other neutral Governments, has communicated to that of Russia a protest in language as unmistakable as that employed by our Foreign Office in 1885: 'I regret to have to inform you, M. l'Ambassadeur,' wrote Lord Granville, 'that her Majesty's

[1] Phillimore's "International Law," vol. iii. s. 245, p. 335.

Government feel compelled to take exception to the proposed measure, as they cannot admit that, consistently with the law and practice of nations, and with the rights of neutrals, provisions in general can be treated as contraband of war.' A timely warning that a claim is inadmissible is surely preferable to waiting till bad feeling has been aroused by concrete application of an objectionable doctrine."[1]

The question whether cotton can be contraband.

It is, perhaps, reasonable to assume that the Russian negotiations declaring raw cotton contraband are at least partially to be explained by the rapid rise of Japan as a cotton-spinning country—a rise well attested by consular reports, and by more than one impartial observer. It need hardly be insisted that there is nothing in international law which can justify Russia in aiming a blow at the industries of Japan under the pretext of regulating contraband trade. Such action is driven for a precedent to the Berlin decree of Napoleon. As early as Von Martens the principle was familiar. 'Sometimes the list of contraband has been swelled out with merchandises which are not evidently and unequivocally intended for the purposes of war though they may be useful to the enemy (ship timber, cables, hemp, coined money, corn, spirituous liquors, tobacco, and other provisions), and at other times such merchandises have been expressly declared not contraband. This last ought always to be presumed between nations that have no treaty with each other."[2]

Raw cotton exported from United States seems to fall under Lord Stowell's principle of exemption in favour of native products.

As Russia has not concluded any treaty with the United States, the great cotton-producing country, declaring cotton contraband, the innocence of that article ought certainly to be presumed. Moreover, the action of Russia seems directly to conflict with the principles laid down by Lord Stowell, in the case where the conveyance of cotton is most likely to occur, that of cotton shipped on account of American cotton growers in American vessels.[3] Even where the ship did not belong to the same country as the neutral owner of the product

[1] *Times*, August 6, 1904.

[2] "Law of Nations," 1802, bk. viii. c. vi. s. 12.

[3] Cf. Sir W. Scott's decision in the *Twee Juffrewen*, (1802) 4 Rob. 242; the *Apollo*, (1802) 4 Rob. 161, referring to *Jonge Pieter*, Adm. 1781 and 1783.

transported, Sir W. Scott refused to confiscate the cargo when it consisted of the produce of the country of the neutral on whose account it was shipped. In the *Apollo* (*supra*) a cargo of hemp was restored to the Russian owner when, on further proof, it was proved to be Russian produce. Sometimes it was regarded a case for pre-emption, but never for confiscation. The idea that Russia condemned cotton as a possible element in the manufacture of explosives may be dismissed in view of the smallness of quantity used for that purpose.

The question whether provisions are contraband.

The most important question which has arisen during the present war from the point of view of Great Britain, is the propriety of including food among articles contraband of war.

View of authoritative writers.

Of Grotius.

The authority of Grotius has been invoked in favour of the practice. But having regard to the fact that he both admits the obligation of restitution and confines the right of intercepting supplies to occasions when they are sent to a blockaded or besieged town which is about to surrender, it is clear that he treated supplies as being conditionally and not absolutely contraband.[1]

Loccenius. Valin

Loccenius (1651) comprehends provisions generally in his class of contraband.[2] Valin[3] refers to the view of Loccenius, but adds, "Par nos lois, et le droit commun, elle (la prohibition) n'a lieu en cette partie que par rapport aux places assiégées." It has been seen that Heinneccius, on the strength of treaties, classes provisions as absolute contraband, since he does not define any condition, or even seem to consider there can be any doubt on the point.[4]

Vattel.

Vattel is in favour of the doctrine that provisions may be contraband, saying that "even provisions" are contraband in "certain junctures, when we have hopes of reducing the enemy by famine."[5] There is, however, a great want of precision in Vattel's observation on contraband.[6] Sir H. S. Maine speaks

[1] "De Jure Belli et Pacis," l. iii. c. i. s. 5.
[2] "De Jure Marit.," l. i. c. iv. n. 5, p. 41.
[3] l. iii. t. ix. art. xi.
[4] "De Navib. ob Vect. Merc. Vetit. Comm." xiv.
[5] "Droit des Gens," bk. iii. c. vii. s. 112.
[6] Phillimore, vol. iii. p. 348; Duer on "Marine Insurance," vol. i. p. 750

of Vattel as beyond comparison the most humane of publicists.[1] It is a little surprising that Vattel, who reproved his master Wolf for severity, should have considered provisions unconditionally contraband, and, indeed, the qualifications he imposes hardly suggest that he really held that view. However, in 1793, when England, by way of retaliation, detained all neutral vessels bound for France and laden with corn, meal, or flour, the authority of Vattel was appealed to as sanctioning the position that provisions may be absolute contraband.

Pothier. Pothier classes provisions as merely conditionally contraband. After saying that it is necessary to distinguish enemy goods from neutral goods, he insists on the exception that contraband goods form to the general immunity of neutral commerce. "Il faut néammoins excepter certain espéces de choses qu'on appelle effets de contrabande, qu'il n'est pas permis aux sujets des Puissances neutres de porter à l'ennemi et qui sont de bonne prise, quel que soit le vaisseau sur lequel elles sont chargées. . . . A l'égard des munitions de bouche, que des sujets des Puissances neutres envoient à nos ennemis, elles ne sont point censées de contrebande, ni par consequent sujettes à confiscation : sauf dans un seul cas, qui est lorsqu'elles sont convoyées à une place assiégée ou bloquée."[2] All writers on international law attest the conflicting nature of the testimony rendered by treaties on the subject, whether provisions are contraband or not, and it would appear that no decisive appeal could be made to authority on the point. The subject is one of far-reaching importance, and the action of Russia in declaring provisions absolute contraband created a precedent of great gravity. Sir Henry Maine, with great prescience, pointed to the failure to define contraband in the Declaration of Paris, and to the tendency to establish new classes of contraband, as a source "of unexampled danger" to this country. He predicted that there would be a struggle to include coal and provisions as

Sir H. S. Maine on "the unexampled danger" of declaring food contraband.

[1] Lectures, "International Law," vii., p. 126.

[2] "Traité du Droit de Domaine de Propriete," 1772, t. i. Pte. 1, c. ii. s. 2; Art. 2, s. 2.

contraband, and that the danger would necessarily arise on the mere outbreak of hostilities.[1] He suggests that the path of safety for this country lies in accession to the United States' principle of the immunity of private property at sea. It would, however, appear probable that if the immunity of private property at sea became an accepted doctrine, the modern public commerce-destroyer and the privateer would alike lose their vocation. The only goods which could be seized would then be contraband goods, the actual property of a belligerent Government, which are not likely to be carried to any great extent in neutral bottoms.

Sir H. S. Maine's proposed provision against contingency.

The gravity of the precedent created by Russia in declaring provisions absolute contraband was recognized in the speeches of Lord Lansdowne and the Prime Minister. Lord Lansdowne, alluding to the British protest against the Russian declaration, observed, "We took up, in particular, the inclusion amongst articles unconditionally contraband of war of provisions, in which I need not say this country is very largely interested. We pointed out that the inclusion of all provisions in this category was a very serious innovation, and we added to our despatch a statement that we felt bound to reserve our rights by protesting at once against the doctrine that it is for the belligerent to decide that certain articles or classes of articles are, as a matter of course, and without reference to other considerations, to be dealt with as contraband of war, regardless of the well-established rights of neutrals."[2] On the day on which Lord Lansdowne made the above statement, Mr. Balfour observed in the House of Commons, "We certainly have felt it to be our duty to point out to the Russian Government that we protest in the strongest way against the idea that food is to be regarded as contraband of war."

Statement of Lord Lansdowne, Aug. 12, 1904.

A fortnight later, speaking at the Foreign Office, in answer to resolutions presented to him by an important deputation, representative of British shipping interests, Mr. Balfour said, "But the principle we have laid down as, we believe, in

Statement of Mr. Balfour, Aug. 26, 1904.

[1] Lectures, "International Law," vi., p. 121.

[2] *Times*, August 12, 1904.

absolute conformity with the laws and practice of nations, is that the warlike stores carried to a belligerent are undoubtedly contraband of war, that coal carried to a belligerent for the purpose of aiding him in his warlike operations is undoubtedly contraband, that food stuffs carried to an army in the field, or to a beleaguered fortress, or carried to a foreign country to aid the troops or fleet, are contraband; but that we do not accept the doctrine which is apparently laid down—and I lay stress on the word 'apparently' because there is some ambiguity about it—we do not accept the doctrine apparently laid down in the Russian notification, that coal, food stuffs, cotton, and many other things are absolute contraband of war, and that the mere fact that they are found on board ship justifies the seizure of the goods and, in certain circumstances, the capture and retention and confiscation of the vessel."[1] It has been an instructive result of the Russo-Japanese War that the neutrality of Great Britain has received more discussion in Parliament than at any other date in the history of this country, except during the American Civil War, 1861–5.

The speeches of Lord Lansdowne and Mr. Balfour showed an adequate grasp of a situation which was by no means free from difficulty. In fact, the problems created by maritime war are almost as numerous as at any period in the history of international law. The Declaration of Paris has proved, as Sir H. S. Maine anticipated, totally inadequate to solve these nice questions. It was contended in one of the most famous documents of maritime law that treaties declaring "Free Ships, Free Goods" were to be regarded as so many exceptions to the principle of maritime law, as defined in the "Il Consolato del Mare," c. 276.[2] The effect of the Declaration of Paris has been to make the exceptions eat up the rule, in Lord Campbell's phrase. But the entire absence of any definition of contraband in the Declaration has left neutral commerce as exposed to the encroachment of belligerent rights as before 1856. Goods which were formerly seized in neutral vessels because they were the property of enemy subjects are now liable to seizure on the pretext that they are contraband.

The Declaration of Paris, 1856, an unsatisfactory settlement.

[1] *Times*, August 26, 1904.

[2] "Collectanea Juridica," vol. i. piece v.

The description of the Declaration of Paris as a code of maritime law is most misleading, for definitions constitute an indispensable element of a code, and the Declaration of 1856 does not contain a single definition.

The Russian concession of Sept., 1904, satisfactory as far as food is concerned.

The *Times* of September 26 contained the announcement that Russia had recognized the British protest by consenting to include food in the category of conditionally contraband articles. This concession brought Russian practice into line with the best opinions. Phillimore had long ago admitted that "to assert that provisions going to an unblockaded port can never be contraband is surely too large a proposition;" and, in fact, the weight of authority is overwhelming to the effect that provisions are contraband *sub modo*. The position from which Russia receded was that food is absolute contraband —a pretension which was adequately treated in the American protest: "Articles which, like arms and ammunition, are by their nature of self-evident warlike use are contraband of war if destined to enemy's territory; but articles which, like coal, cotton, and provisions, though of ordinarily innocent, are capable of warlike, use are not subject to capture and confiscation unless shown by evidence to be destined, etc., to the military or naval forces of a belligerent."[1]

The protest of the United States, *Times*, Sept., 1904.

Russian Prize Courts require an impossible proof.

The note in question proceeded to argue that the technical rule which was apparently enforced in Russian Prize Courts to the effect that the owners of the captured cargo must prove that no part of it might eventually come into the hands of the enemy's forces, demanded an impossible proof, and one which would have the effect of rendering all commerce impossible with the non-combatant population. The ruling of the Vladivostock Prize Court was described by Mr. Hay as "a declaration of war against commerce of every description between the people of a neutral and those of a belligerent State."

A declaration of war against commerce.

But this, in the language of Vattel, "is a violation of the rights of neutral nations, a flagrant injury to them."[2] Further, it had the effect of rescinding by implication two Articles of the Declaration of Paris, 1856. Consistently with

[1] *Times*, September 21, 1904. [2] "Droit des Gens," l. iii. c. vii. s. 112

these principles the Government of the United States refused to accept the decision of the prize court confiscating flour and railway material as absolutely contraband with reference to the seizure of the *Arabia*. Clause 5, Article 10, of the Russian Imperial Order was criticized by Mr. Hay in the light of the maxim, "Quod dolus versatur in generalibus." The order condemned, as unconditional contraband, provisions (*inter alia*) if transported to an enemy destination. But the order failed to distinguish between territory on the one hand, and naval or military forces of the enemy on the other, thus permitting a construction which condemned as contraband all food stuffs proceeding to any part of Japan.

Inconsistent with declaration of Paris.

Enemy destination does not mean the entire littoral of a belligerent State.

The American contention may be reinforced by the great authority of Lord Stowell, who delivered careful judgments, upon the subject in the *Jonge Margaretha*, (1799) 1 Rob. 188, and the *Ranger*, (1805) 6 Rob. 125.

International law on topic declared by Lord Stowell.

The *Jonge Margaretha*, was the case of a Papenberg ship taken on a voyage from Amsterdam to Brest with a cargo of cheese. A store-keeper's certificate was produced, stating the cheeses to be such cheese as were used for English ship stores, where foreign cheese were served, and such as, at that time were being exclusively used in French ships.

Sir W. Scott described the transaction as "that of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy." An additionally aggravating circumstance was, Sir W. Scott proceeded, that there was in Brest a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time were watched with great anxiety by a British fleet which lay off the harbour for the purpose of defeating its supplies. "Was the carriage of such a supply," Sir W. Scott asked, "to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?" The court laid down no such position as that cheese, being a provision, is universally contraband. Sir W. Scott proceeded, "The catalogue of contraband has varied

very much, and sometimes in such a manner as to make it very difficult to assign a reason of the variations owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that, by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. In 1747, butter in the *Jonge Andreas* cutter going to Rochelle, was condemned; how it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I do not exactly know, the distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle in the same year; in 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of food have been so considered—at least where it was probable—that they were intended for naval or military use."

In 1673 an unwarrantable rule was laid down by King's Advocate that corn, wine, and oil were contraband.

The first half of 18th century provisions were considered at least conditionally contraband in English prize courts.

But the doctrine, as thus laid down, was carefully limited. "I take the modern established rule to be this, that generally [provisions] are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it."[1] Both in the case of provisions and naval stores, certain grounds of mitigation have secured a degree of recognition which varies in different countries. Special indulgence is shown—

Established rule provisions not contraband.

Grounds of inferring articles innocent.

(1) Where the articles are the growth of the country of the exporter.

(2) Where the articles are in their native and unmanufactured state, *e.g.* iron, hemp, and wheat as contrasted with anchors, cordage, bread.

(3) Where the articles are intended for the ordinary uses of life, or even for mercantile ship's use; an intention which ought to be presumed from a general commercial destination.

[1] pp. 188–192.

Grounds of condemnation of articles.

On the other hand, to summarize the most authoritative practice, articles are liable to be treated as contraband, being either naval stores or provisions, when—

(1) They are not the growth of the country which exports them;

(2) They are manufactured articles prepared for immediate use;

(3) They are going with a highly probable destination to military use, because they are consigned to a port, "the great predominant character" of which is a port of naval or military equipment.[1]

Lord Stowell's opinion impossible to ascertain final application of an article *ancipitis usus*.

The technical rule of the Vladivostock Prize Court was anticipated and condemned more than a hundred years ago, in the judgment of Lord Stowell in the *Jonge Margaretha*. The rule of the Russian Prize Court is that the owners of the captured cargo (when it consists of conditionally contraband articles) must prove that no part of it may eventually come to the hands of the enemy's forces.[2] Mr. Hay observed that this was a proof of an impossible nature. In the *Jonge Margaretha*, pp. 188, 195, Sir W. Scott observed, "it being impossible to ascertain the final application of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination."

When provisions are confiscated, their destination must be a port of military or naval equipment.

The fact that Brest was essentially a port given over to naval equipment, and that a large expedition was preparing there, to the knowledge of those who owned the *Jonge Margaretha*, no doubt very greatly influenced the decision to confiscate the cargo. As to what constitutes a port, "the great predominant character" of which is a port of naval or military equipment, Sir W. Scott considered that Brest was, and Bordeaux was not, such a place. Agreeably to this distinction between ports of immediate destination, Dutch cheeses going from Amsterdam to Bordeaux on account of a merchant of Altona were restored on further proof.[3] In the case of the *Jonge Margaretha*, the cargo was pronounced contraband, but

[1] Cf. Observations of Sir W. Scott, in the *Jonge Margaretha*, pp. 188, 194, 195.

[2] See *Times*, September 21, 1904.

[3] Welvaart, K., 1 Rob. 195 and note.

When owner acts without dissimulation, ship not confiscated, though it belongs to owner of cargo.

the ship was not confiscated, although it belonged to the owner of the cargo, because he acted without dissimulation, and there was some ground for supposing he had been misled as to the expedition preparing at Brest.

The Ranger, (1805) 6 Rob. 125, was the case of an American ship with a cargo of biscuit and flour which had been shipped from the public stores at Bordeaux and destined, as the court found, for Cadiz, though ostensibly documented for Villa Real in Portugal.

Sir W. Scott observed, "This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to Spain. It must always be remembered that this Government might have availed itself of the interior distress of the enemy's country as an instrument of war. It did not, however, but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which Spain had for some time laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith, both by Spain and her allies. But what is the use now made of it? A large quantity of biscuit, evidently destined for sea-stores, is put on board, as it is impossible to dissemble, from the public store-house at Bordeaux, and sent into the port of Cadiz."

In 1805, when there was a famine in Spain, Great Britain permitted food to be conveyed there.

Both the vessel and cargo were condemned, the former as having been "employed in carrying a cargo of sea-stores to a place of naval equipment under false papers." As an additional penalty the claimant was condemned to pay captor's expenses.

At a time of great public danger, England regarded food only conditionally contraband.

This case shows that even during a life-and-death struggle like that which signalized the year of Austerlitz and Trafalgar, the Government of Great Britain refused to include provisions in the category of absolute contraband, a circumstance which may properly be urged in mitigation of the indefensible pretensions of Great Britain in 1793. Nor must it be forgotten that the claim to treat provisions as contraband put forward in that year was, at least to some extent, provoked by the unprecedented international relations then subsisting between this country and France.

The *Edward*, (1801) 4 Rob. 68.

In the *Edward*, (1801) 4 Rob. 68, a Prussian ship and a cargo of wines were captured on June 16, 1801, on a voyage from Bordeaux, ostensibly to Embden, but found so near the Isle of Saints, and with such apparent contradictions in the log-book respecting the course the ship had held for two or three days before, that the King's Advocate, resting on that point chiefly, to prove a false destination, prayed the court to request the attendance of one of the masters of the Trinity House.

A destination to a port of naval equipment inferred from untruthful entries in log-book.

Captain King, a master of Trinity House, observed (*inter alia*) that the contradictions in the log-book for two days were such that they could not have been honest or truthful entries. The vessel was taken at a point where she could not have been taking while pursuing a proper course to Embden, if the master had been a man of ordinary skill, and unless the weather had been stormy. There was no ground for doubting the former, and no evidence of the latter supposition.

Under these circumstances the court inferred intention of going to Brest. Sir W. Scott proceeded,[1] "The consequences of this will be indubitable, for though wines are not an article generally contraband *per se*, yet in conjunction with all the circumstances of the voyage, they are unquestionably to be considered as naval stores. It was a voyage to Brest, where there was notoriously a large armament lying, very much in want of articles of this kind, articles of an indispensable nature. If such articles had gone with an avowed destination to such a place and at such a conjuncture, the rule of pre-emption would have been a rule of excessive and undue indulgence to apply to such a case; but where the destination is dissembled, confiscation is the clear and necessary consequence. The voyage, being a voyage from one part of the enemy to another, cannot be deemed a voyage of supply to him; but it is to be remembered that Brest is a port not situated within a wine province of that country." . . .

Wines conditionally contraband.

In Lord Stowell's time conditional contraband confiscated.

"The rule has been already established, that the transfer of contraband from one port of a country to another, where it is required for the purposes of war, is subject to be treated

in the same manner as an original importation into the country itself."[1]

In the case of the *Edward* (*supra*) the ship was involved in condemnation with her cargo because of the false representation of her voyage.

The inference from this decision, though not the principle upon which it was decided, requires considerable qualification in these days of rapid railway communications.[2] Sir H. S. Maine[3] points out that if a port of France were now blockaded, the effectiveness of the operation would be very considerably influenced by the increased facilities of railway communication. In the case of a blockade of Brest at the present day, wines would ordinarily be transported by rail from Bordeaux. *Mutatis mutandis*, cases like the *Edward* (*supra*) could not arise. But this consideration does not affect the instructiveness of the decision in point of law. If wines at the present day were conveyed by sea from one belligerent port to another of the same belligerent, being a port of which "the great predominant character" was a port of naval and military equipment, there can be little doubt that the principle of Sir W. Scott's decision would be followed.

The case of the *Allanton*, Russo-Japanese War; and the doctrine of continuous voyage.

The case of the *Allanton*[4] makes it clear that the Russian Prize Courts have adopted a most singular extension of what is known as the doctrine of continuous voyage. The *Allanton*, a British steamer belonging to the North of Ireland Steamship Company, left Murora, in Japan, on January 13, with a cargo of coal for the neutral port of Singapore. She was captured by the Vladivostock squadron and condemned by the Prize Court at Vladivostock.

The doctrine of continuous voyage permanently engrafted on the law of contraband.

The condemnation of the vessel was, apparently, based upon the Russian construction of the doctrine of continuous voyage —a doctrine historically connected with the rule known as the rule of war of 1756. Professor T. E. Holland, in the *Times* (July 13, 1904), while not appearing in any way to

[1] The *Edward*, 1801, 4 Rob. 68, 70.
[2] Cf. Letter of Professor T. E. Holland, *Times*, July 13, 1904.
[3] Lecture, "International Law," vi., p. 116.
[4] Cf. *Shipping Gazette*, June 24, 1904.

defend the action of the Russian Prize Court, pointed out that the American view of the doctrine of continuous voyage could not be entirely dismissed, adding that it would be disastrous if shipowners and insurers were to assume that a neutral vessel, if destined for a neutral port, is necessarily safe from capture. It is true that words capable of this construction may be quoted from one of Lord Stowell's judgments now more than a century old; but many things have happened (notably, the innovation of railways) since the days of that great judge. The United States cases, decided in the 'sixties, in which certain ships were held to be engaged in the carriage of contraband, although their destination was a neutral port, were substantially approved of by Great Britain. This principle was adopted by Italy in the *Doeljwik* in 1896, and was supported by Great Britain in the correspondence which took place with Germany in 1900. It was endorsed after prolonged discussion by the Institut de Droit International in 1896.

Authorities rejecting conclusion

Historicus.

Mr. W. E. Hall.

Sir W. Harcourt, in his discussion of the *Trent* affair, 1861, had used language which suggested a different conclusion: "In order to constitute contraband of war, it is absolutely essential that two elements should concur, namely, a hostile quality and a hostile destination." This view coincided generally with that of the late Mr. W. E. Hall, that there was no analogy between the cases in which Lord Stowell applied the doctrine of continuous voyages and the cases of contraband and blockade to which that doctrine was applied by the American courts. The gravamen of Mr. Hall's argument is that Lord Stowell's doctrine was applied only to the trade between the mother-country and its colonies, and that the Americans extended it to contraband trade generally. But Sir W. Grant, M.R., in the case of the *William*, (1806) 5 Rob. 385, a case to which Mr. Hall refers,[1] expressly referred to an instance in which the doctrine of continuous voyages had been applied to a case of contraband. This was the case of the *Eagle*, 1803; in regard to which the Master of the Rolls observed: "By the original evidence it appeared that the cargo had come from Bilbao to Philadelphia, where it had

Whether doctrine of continuous voyage considered inapplicable to carriage of contraband in

[1] "International Law," p. 669.

English Prize Courts during Great War Question. *Que.*

been landed, and where it was proceeding in the same vessel to the Havannah. The condemnation in the court below had proceeded on the ground that the cargo was contraband of war. The only question here was with regard to the continuity of the voyage."[1] Restitution was decreed on the ground that the case was not one of continuous voyage, because there had been a *bonâ fide* importation into America. But as the Court of Appeal considered the question of continuous voyage without disturbing the decision of the court below on contraband, it is reasonable to infer that the doctrine of continuous voyage was not wholly inapplicable, even in Lord Stowell's time, to the conveyance of contraband. Wheaton's editors consider that it created an innovation in the law of prize to apply the principle of continuous voyages to the conveyance of contraband.[2] But this can hardly be successfully maintained in view of the explicit nature of Sir W. Grant's judgment in the *William*. It may, of course, be properly pointed out that the application of the doctrine of continuous voyages to the conveyance of contraband is hardly consistent with one of the best known of Lord Stowell's judgments, the *Imina*.[3] But the case of the *Eagle* can be reconciled with even this last case, if it is treated as a case of a vessel with a false destination. There would appear to be considerable analogy between sailing under false papers from a neutral port to a belligerent port, and sailing from a neutral (or belligerent) port to a belligerent port *viâ* an interposed neutral port. There is the same fraud practised on the other belligent, and it is essential to recollect, as appears from Lord Stowell's judgments, that the ground of condemnation in the prize court of a belligerent is the fraud practised upon him under the neutral's flag. Whether fraud exists or not is to be inferred from the ship's papers, and when proved to exist, fraud always involved the condemnation of the vessels as well as the cargo.[4] Where there is no fraud, as in the case of the

[1] *Per* Grant, M.R., in the *William*, 1806, 5 Rob. 385, 401.

[2] Wheaton's "International Law," ed. 1904, p. 685.

[3] 1800, 3 Rob. 167.

[4] *Per* Sir W. Scott in the *Ringende Jacob*, (1798) 1 Rob. 89, 91, referring to *Eliza Holtz*, Adm., July 3, 1794.

Jonge Margaretha, (1799) 1 Rob. 188, the cargo may be liable to either pre-emption or confiscation, but the ship is not confiscated.

The *Imina* was the case of a cargo of ship timber which had sailed (July 1798), from Dantzic, bound originally for Amsterdam, but making at the time of capture for Emden, in consequence of the blockade of its port of destination.

Lord Stowell's opinion, no penalty can be incurred if neutral port the real destination.

Sir W. Scott said: "This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Emden, a neutral port, a destination on which, if it is considered as the real destination, no question of contraband arises, inasmuch as goods going to a neutral port cannot come under the description of contraband.[1] The papers of the *Imina* left the matter in some doubt whether the cargo was contraband. Sir W. Scott proceeded to observe that he could not fix the character of contraband upon them "in the present voyage," even if the goods were liable to be considered contraband on a hostile destination. "The rule respecting contraband," Sir W. Scott observed, "as I have always understood it, is that the article must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting a port on a hostile destination the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of the voyage, the penalty is not now generally held to attach."[2]

Articles must be taken *in delicto*.

The offence of conveying contraband, unlike the offence of preparing an illegal expedition under the Foreign Enlistment Act, 1870, s. 11, is not completed by the intention. Even a criminal deviation by the master does not immediately implicate the cargo. In the case of the *Imina*, the master, on receiving information of the blockade of Amsterdam, changed his course and shaped for Emden. This was "a favourable alteration of his course." A favourable alteration cannot protect cargo where there is a guilty act at the time of capture.

A vessel ostensibly engaged in conveyance of contraband may make a favourable alteration of her course.

[1] *Imina*, (1800) 3 Rob. 167–169.

[2] Ibid., *supra*,

But here there was no guilty act at the time of capture. A criminal deviation does not immediately implicate the cargo, because the master is not *de jure* agent of cargo owners unless so specially constituted by them. In the case of the *Imina*, if the capture had been made a day before the alteration of the course, different considerations would have arisen. But the owners were entitled to the benefit of the change of course, which was an absolute defence to the charge of contraband. However, the court held that the captors of the *Imina* were entitled to their expenses, because the original destination furnished an abundant excuse for bringing the vessel in to stand her trial.

Having regard to the attempt which is likely to be repeated to apply the doctrine of continuous voyage to the carriage of contraband, it may be worth while shortly to recall some further decisions on the subject of continuous voyage.

In the *Maria*, (1805) 5 Rob. 365, an American ship sailed from Havannah to New Providence, with a cargo of colonial produce, and was proceeding at the moment of capture with a considerable part of that cargo on board to the port of Amsterdam. The head note of the case states that the question raised was that of a continuous voyage in the colonial trade of the enemy, country viz. Spain. But as the destination was not to the mother-country, Spain, it is very difficult to understand how the case ever came to be regarded as a case of a continuous voyage, even though Amsterdam was a belligerent port. A note to this case shows that colonial produce, re-exported by means of drawbacks from America to Europe, was estimated to amount to twenty eight-millions of dollars out of a total of seventy-five millions of dollars exports annually at this date. The extent of this commerce was naturally the cause of much resentment in England, which did not at that time recognize the doctrine of Free Ships, Free Goods. Sir W. Scott observed that two questions had been made on the facts: (1) Whether the goods were liable to condemnation? (2) Whether the ship as concerned in the same illegal transaction was subject to the same penalty?

The learned judge added, "It is certainly true that a continued voyage from the colony of the enemy to the mother-country, or to any other ports but those of the country to which the vessel belongs, will subject the cargo to confiscation; and the only point which the court has to decide is whether the voyage in question is to be considered a continuous voyage or not."[1] It is, perhaps, proper to point out that this very sweeping enunciation of the doctrine of continuous voyage must be read with the judge's equally express statement,[2] that the fact that the destination was not to the mother-country of the colony had its "due weight" in favour of the claimants. It must always be remembered that in 1805, the English interpretation of the law of nations was that the goods of an enemy, on board the ship of a friend, were lawful prize. If the goods were enemy goods, it was not necessary to invoke the doctrine of continuous voyage to justify their confiscation. Again, goods going to a neutral port might be on account of belligerent owners. The principle of continued voyages was declared by Sir W. Scott not to be a new principle, saying, "On the contrary, it is an inherent and settled principle in all cases in which the same question can have come under discussion, that the mere touching at any port without importing the cargo into the common stock of the country will not alter the nature of the voyage, which continues the same in all respects, and must be considered a voyage to the country to which the vessel is going actually for the purpose of delivering her cargo at the ultimate port." A very important case on the subject was the *Essex*, (1805) C.A., a case of a trade from the mother-country to the colony, with a full knowledge of the circumstances, and a distinct adoption of the purpose on the part of the owner. The *Essex* was an American vessel, which had gone from America to Lisbon, where, meeting an indifferent market, she went to Barcelona, and there took on board a cargo of Spanish produce for Havannah. This step was taken under the direction of the agent in Europe, that she should go to Havannah, first touching at Salem, in America. The owner, who was

Large definition of continued voyage enunciated by Lord Stowell.

The principles of continued voyage considered settled by Lord Stowell.

A continued voyage, merely made from trade exigency, incurs liability.

[1] The *Maria*, (1805) 5 Rob. 368.

[2] At p. 371.

resident at this place, adopted the plan and allowed the vessel to proceed. The court found that it was the intention, originating in the mind of an authorized agent, acting under full powers, that the vessel should go to the Havannah and that this purpose was adopted by the owner; but that it was in reality a continued voyage from Spain to Havannah, that as to the intention all doubt was done away with by the adoption on the part of the owner, who had the vessel in his own port, and was fully implicated in the projected voyage.

The *William*, (1806) 5 Rob. 385, was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice-Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilbao in Spain, and claimed on behalf of claimants from Marblehead, Massachusetts, were condemned, July 17, 1800.

It appeared in evidence that the ship had gone to Martinique, where the outward cargo was disposed of; that she then proceeded to La Guaira, Venezuela, at that date a colony of Spain, and took on board a cargo of cocoa, the property of the owners, which was brought to Marblehead on May 29, 1800. The ship was then unladen, after which she again took on board the chief part of the former cargo, with some sugars brought from Havannah in other ships, and then on June 7 sailed upon a destination to Bilbao. The case came before the Lord of Appeal in 1804, who reversed the sentence of the Vice-Admiralty Court at Halifax, but directed further proof to be made as to the cocoa imported into, and exported from, Marblehead, America, within nine months.

The goods shipped at interposed neutral port may not all have been brought from belligerent colony by vessel making continued voyage.

Sir W. Grant, M.R., observed, "According to our understanding of the law, it is only from his Majesty's instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and the mother-country, but had, on the contrary, ordered all the vessels engaged in it to be brought in for lawful adjudication; and what the present claimants accordingly maintain is, not that they could carry the produce of Laguira directly to Spain, but

that they were not carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain. What, then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed would change its denomination and make it cease to be a direct one within the intendment of the instructions. . . ." The act of importation is necessarily the same, whether the voyage is really ended, or whether it is only effected to give it the appearance of being ended. The landing at the Custom House and the payment of duties are mere voluntary ceremonies in the case of a fictitious importation with a view to a continued voyage. But when the truth is discernible about the transaction, the payment of the custom duties may be only a means whereby the doctrine of continuous voyages may be defeated as it is understood in an English Prize Court. In the case of the *William*, it was shown that the unlading, reshipping, and payment of the customs duties all took place within a few days. The landing was almost instantaneously followed by the reshipment. There was, therefore, no genuine importation, and what was done was intended only to pass for importation in the prize court.

Difference between a genuine and a fictitious importation.

Sir W. Grant then proceeded to refer to other cases in which the doctrine of continuous voyages had received construction.[1] In the *Maria*, (1805) 5 Rob. 365, 368, Sir W. Scott expressed his surprise that any one should represent the doctrine of continuity of voyage as new, and treated it as an inherent and settled principle. But as applied to a colonial trade, the doctrine was clearly only five years old, and the fundamental or leading case on the doctrine of continuity of voyage was decided in the House of Lords only a few months before Sir W. Scott decreed restitution in the *Maria*. This seems to show that the principle of continuity

[1] *Essex*, Lords, June 22, 1805; considered by Sir W. Scott the leading or fundamental case in the *Maria*, 1805, 5 Rob. 365, 369; *Polly*, Adm. 1800; *Mercury*, 1802; *Eagle*, Adm. 1803; the case in which the doctrine of continuity was applied to a contraband cargo. *Free Port*, 1803.

Doctrine of continuity of voyage applies where no proof of payment of import duties at interposed port.

of voyage may have had an earlier connection with the conveyance of contraband, with which it was undoubtedly associated in the case of the *Eagle* (q. v. *ante*).[1] In the case of the *William*, it was held that the voyage was illegal, as there was no proof of actual payment of the import duties at the port in Massachusetts.

The doctrine in the United States.

The American cases which applied the doctrine of continuity of voyage to the conveyance of contraband arose out of the events of the American Civil War.

In one of these, the *Bermuda* (1865), 3 Wallace 515, the principles enunciated were the following. Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage. A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transactions and in the accomplishment of the same purpose.

The *Circassian*, (1864) 2 Wallace, 135, on the principle of continuity of voyage, decided that a vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at the time of capture, with ulterior destination to the blockaded port.

Where doctrine of continuity of voyage does not apply.

The *Springbok*, (1866) 5 Wallace, 1, laid down the following principles on the doctrine of continuity of voyage. Where the papers of a ship sailing under a charter party are all genuine and regular, and show a voyage between ports neutral within the meaning of international law; where there has been no concealment nor spoliation of them; where the stipulations of the charter party in favour of the owners are apparently in good faith; where the owners are neutrals, have no interest in

[1] Adm. 1803.

the cargo, and have not previously in any way violated neutral obligations, and there is no sufficient proof that they have any knowledge of the unlawful destination of the cargo;—in such a case, its aspect being otherwise fair, the vessel will not be condemned because the neutral port to which it is sailing has been constantly and notoriously used as a port of call and transhipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war, and was meant by the owners of the cargo carried on this ship to be so used in regard to it.

The case of the *Allanton* July, 1904.

The letter of the owner of the steamship *Allanton* rendered the decision of the Vladivostock Prize Court incomprehensible in the light of prize law as understood both in this country and in the United States.[1] The vessel was carrying coal, which is absolute contraband under the Russian regulations. But she was proceeding away from belligerent territory to a neutral port. Even if she had previously been engaged in contraband transactions, she could not have been confiscated according to English prize law, as Lord Stowell said in the *Imina*, (1800) 3 Rob. 167, 168: "Under the present understanding of the law of nations you cannot generally take the proceeds on the return voyage." However, the Prize Court at Vladivostock did not even allege that the *Allanton* had been engaged in previous contraband transactions. The only conceivable ground on which the decree could have proceeded was that the *Allanton* was a case of false destination and fraudulent papers, like the *Edward*, (1801) 4 Rob. 68. It is sufficient to say that no such suggestion has been made. The Russian Prize Court are stated to have grounded their decree (*inter alia*) on the supposition that the *Allanton* intended to proceed to some port in Japan. But this supposition would only have been justifiable if the vessel was out of its proper course. It was stated by the owner, Mr. Rea, that so far from this being the case, the *Allanton* was seized when proceeding in a perfectly straight line from Muroran to Singapore. In a case before Lord Stowell a false destination was inferred when a ship, being ostensibly bound for Lisbon, was taken with

[1] Cf. *Times*, July 8, 1904.

contraband out of her proper course, steering towards one of the Spanish ports in the Bay of Biscay.[1] In another case already noticed, Sir W. Scott inferred that the ostensible destination was false when it was stated to be Emden, but the vessel was found near the Isle of Saints, and had been hovering about, and adhering to, the French coast.[2] In the case of the *Allanton* there were no apparent inconsistencies in the vessel's conduct that required explanation, arising either from the place where she was seized or from false or contradictory papers, and hence the decision seems altogether inexplicable. It is satisfactory to know that this wholly unwarrantable decision was reversed on appeal.

The case of the German vessels seized in African waters was defended by Professor Holland in the *Times*, though it involved an extension of the principle of continuous voyages to the conveyance of contraband, as "an innovation which seems to be demanded by the conditions of modern commerce."[3] If the case of the *Bundesrath* be regarded as a case of a continuous voyage, it cannot be regarded as affording an instance of an innovation in prize law, since, as has been seen, Sir W. Grant, M.R., in the case of the *Eagle*, applied the doctrine of continued voyages to a case of contraband. The circumstances of the seizure of the German vessels in 1900 recall the observation of Grotius, "Distinguendus erit belli status." The situation of the belligerents in the South African War was altogether exceptional, and afforded a striking instance of the different consequences attaching to a contraband traffic by sea and a contraband traffic by land. Valin's commentators, Pistoye and Duverdy, observed that, while both kinds of traffic were equally unneutral, only the transportation by sea was prohibited.

A view similar to the American view, applying the principle of continued voyages to the conveyance of contraband, was taken by the Italian Court in the recent case of the *Doeljwik*, a Dutch vessel captured and declared good prize on the ground that, though bound for the French colonial port of

[1] The *Franklin*, (1801) 3 Rob. 217. [2] The *Edward*, (1801) 4 Rob. 68.
[3] *Times*, January 3, 1900.

Djiboutil, it was laden with an extraordinary provision of arms of a model out of use, which could only be intended for the Abyssinians, with whom the Italians were at war.[1]

The case of the *Doeljwik* was tried in the Commercial Court before the present Master of the Rolls in 1897.[2] The ship was captured and declared good prize on the ground that, though bound for the French colonial port of Djiboutil, it was laden "with an extraordinary provision of arms of a model out of use." The principle of continuity of voyage, therefore, came specifically up for adjudication in the Italian Prize Court if it is considered applicable to the conveyance of contraband. As regards proceedings in the Commercial Court, notice of abandonment was given, but refused, and before the action came up for trial, though after it was commenced, the ship was restored by the Italian Government on the ground that the war was over.

The Master of the Rolls, then Mr. Justice Collins, held that the plaintiffs were estopped by the decision of the Italian Prize Court as far as the findings of fact were concerned. The question was solely whether there was concealment or misrepresentation of material facts, unless it was shown that the ship was confiscated for carrying false papers, an act of the shipowners outside the risk insured. The jury found a verdict for the plaintiffs, but the further point was reserved for argument whether the vessel should be regarded as a total or a partial loss. Mr. Justice Collins, in a very learned judgment, held that the commencement of the action was the crucial date, and that matter arising after an action will not defeat an abandonment before action, but must be dealt with according to the rights of the parties under the abandonment. The plaintiffs, therefore, were entitled to recover as for a total loss.[3]

[1] *Brusa*, "Rev. Gin. de Droit International Public," 1897; *Fauchille*, id. 1897, p. 291; *Fedozzi*, "Rev. de Droit International et de Legislation comparée," 1897, p. 55; *Diena*, "Journal du Troit International Prise," 1897, p. 268.

[2] Cf. *Ruys* v. *Royal Exchange Assurance Corporation*, *Times*, April 14, 15; May 21, June 1.

[3] *Times*, May 25 and June 1, 1897.

PARTS V., VI., VII.

CONTRABAND OF WAR.

Pre-emption applies only to articles conditionally contraband.

THE doctrine of pre-emption only applies to articles conditionally or provisionally contraband (*contrebande relative ou par destination*). There can only be pre-emption where the declaration of a belligerent regarding contraband recognizes two classes. In the present war, as has been seen, the Japanese regulations contain the division, while the Russian regulations do not. When pre-emption is exercised, the penalty is loss of freight and captor's expenses. Pre-emption is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband. Lord Stowell appears to have considered that articles, the produce of the country which exported them, were not contraband because they were subject to the right of pre-emption.[1] There was no universal principle of relaxation in favour of the export of native produce.[2] Again, Lord Stowell confiscated provisions, which he expressly allowed were only articles conditionally contraband.[3] It is clear that there was a rule of pre-emption in Lord Stowell's time, but it seems to have been defeasible in operation.[4]

Claimants lose freight and captor's expenses.

Former uncertainty as to incidence of pre-emption.

The law is now clear that articles conditionally contraband are liable to pre-emption only, though it is to be presumed

[1] Cf. observations in the *Twee Juffrouwen*, (1802) 4 Rob. 242, 243.

[2] The *Staat Emden*, (1798) 1 Rob. 26, 29.

[3] *Jonge Margaretha*, (1799) 1 Rob. 188.

[4] Cf. case of the *Eliza Holtz*, Adm. July 3, 1784, referred to by Sir W. Scott in the *Ringende Jacob*, (1798) 1 Rob. 91.

that they would be confiscated in cases where there are circumstances of falsehood and fraud, as to papers and destination of the voyage.

The Statute 27 & 28 Vict. c. 25, s. 38, provides that—

By Statute 27 & 28 Vict. c. 25, s. 38, Admiralty may exercise pre-emption without bringing in.

"Where a ship of a foreign nation passing the seas, laden with naval or victualling stores intended to be carried to a port of any enemy of her Majesty, is taken and brought to a port of the United Kingdom, and the purchase, for the service of her Majesty, of the stores on board the ship appears to the Lords of the Admiralty expedient, without the condemnation thereof in a prize court, in that case the Lords of the Admiralty may purchase on the account or for the service of her Majesty all or any of the stores on board the ship; and the Commissioners of the Customs may permit the stores purchased to be entered and landed within any port."

English practice is pre-emption at 10 per cent. profit.

The English practice is usually to purchase at the market value with a reasonable allowance, usually 10 per cent. for profit. Rules for ascertaining the value of the merchandise seized, and for other matters of detail connected with the practice, were laid down in the treaty between Great Britain and the United States in 1794, and in that between the former country and Sweden in 1803. The fact that pre-emption was exclusively applied to the new kinds of contraband has caused MM. Heffter (s. 161) and Calvo (ss. 2517, 2518) to look upon pre-emption, not as a mitigation, but as an intensification of the privileges of a belligerent.

Mr. W. E. Hall, on the other hand, considers[1] pre-emption a belligerent concession. It may, however, be recalled that Grotius quotes with approval the French edicts of 1584 and 1585, by which even munitions of war were to be paid for by the belligerent, and denies that the confiscation of munitions of war, practised at that date by the northern countries, could be regarded as "a permanent rule of equity." Grotius, therefore, rather suggests that the permanent rule of equity is that pre-emption should be applied to munitions of war.[2] But Mr. W. E. Hall regards the application of pre-emption to munitions of war as tantamount to sweeping away

Opinion of Grotius that pre-emption should apply to absolute contraband.

[1] "International Law," p. 665, and note. [2] *Ante*, "International Law," p. 196.

the whole law of contraband. While Ortolan clearly did not consider that pre-emption ought to apply to munitions of war —he confined the category of contraband to munitions of war —M. Bluntschli (ss. 806 and 811) considers that pre-emption ought to apply to intercepted munitions of war.

M. Heffter thinks that pre-emption ought to be calculated on the basis of the profit which would probably be realized if the voyage were completed. Sir W. Scott said on this point—

Sir W. Scott's opinion, pre-emption not to be estimated by price enemy would give.

"I have never understood that . . . on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that, acting upon my rights in war in intercepting such supplies, I am under the obligation of paying that price of distress."[1]

This last case is cited by Phillimore as containing the best enumeration of the principles which govern the British courts on the subject of pre-emption. A point arose as to whether the charge of insurance ought to be included in the pre-emption valuation. It appears that, shortly before the decision, cases of this kind were settled by the Navy Board, and the charge of insurance allowed, without the policy being called for. But Sir W. Scott refused to include the charge of insurance, because—

Pre-emption does not include premiums.

(1) Payment of insurance money is only due on the event of the risk having been actually incurred. The risks here spoken of are ordinary sea risks. Sir W. Scott spoke of these as not having been incurred, because the vessel, on a voyage from Altona to Cadiz, had been seized in the British Channel.

Despatches, when contraband?

(2) The cargo of wheat in the case of the *Haabet* was, in its own nature, liable to be intercepted by a belligerent.

The despatches of the ambassador of a belligerent accredited to a neutral court are not liable to seizure, as they are presumed to have reference to matters between the belligerent

[1] The *Haabet*, (1799) 2 Rob. Adm. Rep. pp. 174, 182.

and neutral States. Consular despatches are also exempt from seizure under the same circumstances. Phillimore considers that it is competent to a belligerent to stop the ambassador of his enemy on his passage.[1] This was written in 1857, and seems to be inconsistent with the result of the *Trent* affair, 1861, in which two commissioners of the United States, Messrs. Slidell and Mason, were taken out of a British mail steamer, on the high seas, by the captain of the *San Jacinto*, an American ship-of-war. This proceeding was unanimously condemned by all the Powers, who united with Great Britain in demanding the restoration of the commissioners. Messrs. Slidell and Mason were accordingly released.[2] One of the reasons alleged by the captain of the *San Jacinto* for not bringing the *Trent* for adjudication before a prize court was that he wished to spare the other passengers the inconvenience of deviating from their voyage. It is interesting to recall this in connection with the fact that during the present war the Russian volunteer cruisers in the Red Sea detained a German mail steamer, the *Prinz Heinrich*, and took two bags of mails out of her. Such a proceeding exhibits considerable analogy to the action of Captain Wilkes of the *San Jacinto* in 1861, and what was deemed an inadequate explanation in the one case can hardly be considered adequate in the other.

Whether persons can be contraband.

It is convenient now to consider the question of the carriage of military persons in the employ of a belligerent, or being in any way connected with his transport service. The crucial test on this subject is whether the ship carrying the military persons is hired by the belligerent.[3] If the vessel is hired by the belligerent, it is liable to condemnation as prize, whether the persons conveyed are few or many, important or insignificant. Sir R. Phillimore holds that the importance of the persons conveyed is an essential element in determining whether the vessel in which they are seized may be confiscated; "to

Vessel conveying them must be hired by belligerent.

[1] "International Law," vol. iii. p. 368.

[2] Mr. Seward to Lord Lyons, December 26, 1861.

[3] Montague Bernard, "Neutrality of Great Britain during the American Civil War," p. 223.

send out one general may be a more noxious act than the conveyance of a whole regiment."[1] The *Orozembo* was the case of a vessel admittedly American, and therefore neutral, and the title to restitution was impugned, on the ground that it was employed at the time of its capture, 1807, in conveying military persons first to Macao, and then to Batavia. Holland at this date was in alliance with Napoleon. The charter party was not a genuine document; it spoke of a cargo, but none was placed on board. The military persons were carried as supercargoes, who were themselves made the subject of stipulations as to freight. The events of the Russo-Japanese War cannot be said, in view of the incident of the *Prinz Heinrich*, to establish the presage of Mr. W. E. Hall, that "much tenderness would, no doubt, now be shown in a naval war to mail vessels and their contents; and it may be assumed that the latter would only be seized under very exceptional circumstances."[2] It cannot, of course, be said that the Russians have very repeatedly stopped mail vessels, but the *Malacca* incident must be associated with that of the *Prinz Heinrich*. During the present war, English vessels conveying Japanese troops have been sunk by the Vladivostock squadron. There seems to have been no offer to surrender, and under these circumstances the destruction of the vessels, though an act of great severity, was within the belligerent rights of Russia. The Russian regulations declaring contraband "assimilate" the conveyance of troops to the conveyance of absolute contraband.

The carrying of despatches—being official communications from an official person in the public affairs of the belligerent Government—is ground for confiscation of the ship, and of the cargo, if both belong to the same owner. The case of the *Prinz Heinrich* is the single instance during the Russo-Japanese War of seizure for the conveyance of despatches. But the vessel was not detained, though mail-bags were taken out of her.

[1] Phill. vol. iii. ss. 272, referring to the case of the *Orozembo*, 4 Rob. Adm. Rep. pp. 453, 454.

[2] Ibid., p 679.

Penalty for carrying absolute contraband.

It is convenient next to consider the penalty for carrying contraband articles when they are unconditionally or absolutely contraband.

In the case of the *Neutralitat*, (1801) 3 Rob. 295, 296, Sir W. Scott defined the practice, "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times had, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions—

Ancient rule, ship involved in fate of cargo.

Ancient rule, relaxed by Lord Stowell.

(1) "Where a ship belongs to the owner of the cargo, or (2) where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It follows that the penalty for conveying absolute contraband is (1) the confiscation of the contraband article, and any other articles belonging to the owner of the contraband, including the ship; (2) "loss of freight; (3) captor's expenses."

Substantial test of the liability of ship to be confiscated, is the privity of owner of ship to conveyance of contraband.

In the case of the conveyance of conditional contraband, the only loss incurred is freight and captor's expenses. If the owner of the ship is privy to the carriage of the contraband goods, the vessel is involved in their fate. Lord Stowell illustrated the same principle in holding that where the ship conveys contraband under a false destination or false papers, she is liable to be confiscated. The fact that a ship has false papers or false destination affords circumstantial evidence of conclusive character that the owner of the vessel knows that she is conveying contraband.

The variance between the ancient rule of involving the ship

in the fate of the cargo, and the modern one exempting the vessel *sub modo* from confiscation, is explained by the ancient presumption that the master knew the contents of his cargo. The knowledge of the master is the knowledge of the owner, since the former is the latter's agent. Therefore, formerly it was presumed that the owner knew the contents of the cargo.[1] But according to Valin[2] his contemporaries consistently rejected the excuse of a master's ignorance. But if this excuse be rejected, the logical consequence is the confiscation of the vessel in all cases where it is carrying absolute contraband.

Mr. W. E. Hall[3] speaks of the *Ordonnance de la Marine* of Louis XIV. as sanctioning the confiscation of the ship, semble, in all cases. But Pothier very definitely says—

"Observez une difference que l'Ordonnance met entre les marchandises de contrebande et les effets appartenants aux ennemis; par cet article, il n'y a que les marchandises de contrebande que sont sujettes, à confiscation; le navire où elles se sont trouvées, n'y est, point sujet; au lieu que le navire ou se sont trouvées les effets, appartenants aux ennemis est par l'Art. 7, declaré de bonne prise avec son chargement."[4]

In view of this very definite statement of Pothier, there are grounds for supposing that before and after 1681 it was

[1] Cf. the case of the *Oster Risoer*, (1802) 4 Rob. 199, where the court held that if the master could be permitted to aver his ignorance of the contents of his cargo it might be applied to excuse the carrying of all contraband. It seems clear, therefore, that the rule as applied by Lord Stowell, as regards the effect of knowledge of the master, and therefore of the owner, is really less stringent than that which now prevails. In Lord Stowell's time a master was always supposed to know the contents of the cargo, but that knowledge had not the effect of confiscating the ship unless there was dissimulation. But the rule as stated by Mr. W. E. Hall makes the mere fact of the owner of the cargo being privy to the conveyance of contraband the cause of confiscation, without any further concealment or dissimulation. It seems clear that the maxim, "Ignorantia juris neminem excusat," cannot be said to be susceptible of any exact insistence in the case of the belligerent's regulations declaring contraband. Such regulations, it has been seen, are not prohibitions by international law, and prize courts administer international law. Therefore, in the case of conditional contraband, a *bonâ fide* ignorance of the master that he was conveying contraband might be a good defence in a belligerent prize court, when the article is one, as it easily might be, that has no apparent connection with belligerent operations.

[2] "Traité des Prises," c. v. s. 5.

[3] "International Law," p. 166 and note.

[4] "Traité de Droit de Domaine de Propriété," (1772) t. i. Pt. 1., c. ii. s. 2, Art. ii. ss. 2.

not the practice to confiscate the vessel in France for conveyance of contraband. A note of the learned reporter to the case of the *Franklin*, (1801) 3 Rob. 217, affords some valuable information as to the early practice. Bynkershoek and Heineccius both agree that on principle the penalty ought to attach equally on the ship as well as on the cargo. "Si scientibus dominus contrabanda ad hostes deferrent, et nisi pacta impediant." And so the ancient practice appears to have been (v. "Collect. Marit.," p. 58; and with regard to land wars also, and carriage by land and sea, Bœrius Decis. Burdegal, 178). By the Roman law a vessel might be forfeited to *fiscus* if anything illicit was placed on it (D. L. 39, c. iv. s. 11).

Soon after the time of Grotius (1625), who did not particularly discuss the case of a ship carrying contraband, a relaxation is first met with in treaties.

The first treaty in which an exception was introduced in favour of the ship was in 1650 between Spain and Holland, in which the terms are general and admit of no particular observation. The second was a treaty between France and the Hans Towns, May 10, 1655, in which the terms are very special, and point distinctly to the principle on which the relaxation was founded, when the owner of the vessel might be supposed to be a stranger to the transaction. Stipulations in treaties to this effect became more general.[1] The Ordinances of France, 1778, declared that ships should be deemed prize when three-fourths of cargo was contraband. But this was after the date of Pothier's treatise cited above.

The topic of the penalty of contraband becomes important in view of Russia's regulations declaring contraband. According to the Russian declaration issued in 1854, the ship was confiscated in all cases. According to the Russian declaration, 1904—

"Neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated."[2]

[1] Cf. "Treatise of the Dominion of the Sea," p. 472.

[2] *Times*, March 1.

Since this declaration Russia has sunk neutral vessels at sea, without the adjudication of a prize court, and after the confiscation of the *Allanton*, little regard will be paid to her intimation that she proposes to abate the full severity of the ancient rule, relaxed by Great Britain for more than a hundred years.

The only authority among the text-book writers for a single inflexible classification of contraband is afforded by Hübner. But though he includes both munitions of war and articles *ancipitis usus* in the same catalogue, he is careful to stipulate that articles *ancipitis usus* are only contraband when conveyed to blockaded places.

CHAPTER XIII—(*continued*).

PART VIII.

TREATIES DECLARING CONTRABAND.

No exact inference can be drawn from treaties as to what is contraband.

According to Phillimore no general inference can be derived from an investigation of treaties to elucidate the question whether naval stores and materials for shipbuilding[1] or provisions[2] are contraband or not.

Treaties declaring contraband do not apply to allies or belligerents.

It is necessary to recollect that treaties respecting contraband are framed for cases where one party is in a state of neutrality, and not where they are allies in war. As between allies, questions of contraband are to be determined by the Common Law of Nations, and not by treaties, though it cannot be said that the relations of the Allied Powers in the Crimea were generally determined as to the rights of maritime capture by the Common Law of Nations, inasmuch as the principle of free ships, free goods, which they adopted, rested on the authority of treaties. It is, however, sufficiently clear that no general inference can be derived from treaties to decide what is and what is not contraband.

Conclusions of Hautefeuille.

A writer who has gone into the subject at great length[3] concludes that while the treaties containing an extended category of contraband of war are only nine in number, those limiting contraband to munitions of war, horses, and saltpetre number nearly fifty. He points out that few treaties before the seventeenth century contained categories of contraband, but the first treaty he cites as containing a list of contraband

[1] "International Law," vol. iii. p. 354. [2] Ibid., p. 345.

[3] Hautefeuille, "Droits et Devoirs des Nations Neutres en Temps de Guerre Maritime," 1848, t. ii. titre viii. s. 2, ss. 2, p. 234.

was one between Philip of Spain and James I. of England, 1604, by which contraband was not confined to munitions of war.

It is always recognized that Hautefeuille wrote strongly under the influence of the idea that primitive law prohibited the inclusion of any articles except munitions of war in lists of contraband. Mr. W. E. Hall observes that he excludes from the list all treaties which conflict with his theory. He even deduces contradictory inferences from the same treaty, by placing it both in the category of those treaties which extend, and those which do not extend, the list of contraband.[1]

Instance of Hautefeuille's inaccuracy.

But his conclusions morally true.

It is not, however, the fact that all Hautefeuille's conclusions have been shaken, and a scientific analysis would probably reveal the conclusion that the majority of treaties restrict contraband to munitions of war, horses, and saltpetre. Both Hautefeuille[2] and Mr. W. E. Hall[3] concur as to the effect and influence of the Treaty of Utrecht, 1713, which limited contraband to munitions of war, saltpetre, and horses, and formed the basis of European maritime law; a great number of treaties borrowed the definition of contraband furnished by the Treaty of Utrecht. Even the treaties concluded by England during the eighteenth century in the main followed the Treaty of Utrecht, which would suggest that during this period Great Britain did not consider either provisions or naval stores to be contraband. The tendency of wars to become more and more naval caused Great Britain to include naval stores as contraband by treaty with Sweden in 1812, and with Denmark, 1814.

Whether Treaty of Utrecht can be classed as a treaty with restricted category of contraband.

Article 20 of the Treaty of Utrecht, 1713, premised that certain articles, among them all kinds of provisions, coal, and naval materials, were likely to give rise to difficulties,

[1] The treaty between England and Holland, 1654 (Dumont, t. vi. pt. 2, p. 74), is placed by Hautefeuille among the treaties containing an extension of contraband vol. ii. p. 324; and among those restricting it at p. 319. The treaty is alluded to by Mr. W. E. Hall, "International Law," p. 741 and note. It included provisions and money as contraband, and, therefore, cannot be classed as a treaty restricting contraband.

[2] "Droits et Devoirs des Nations Neutres en Temps de Guerre Maritime," t. ii. titre viii. s. 3, p. 321.

[3] "International Law," p. 643.

because of their common usage in peace and war. This is noticed by Hautefeuille (t. ii. p. 321), though it to some extent impairs his argument that the Treaty of Utrecht restricted contraband to munitions of war. But apparently the Treaty of Utrecht only embodied the limited category of contraband adopted by France. France consistently acted upon the principle that provisions were not contraband, though, by one treaty concluded with Denmark, 1742, naval stores were made contraband. The practice of Spain has been identical in principle with that of France, with one conspicuous exception. The Spanish Decree of April 23, 1898, did not expressly include horses among contraband of war. The practice of France, consistently followed by Spain, was to class horses as contraband ever since the *Ordonnance de la Marine* of Louis XIV.[1] The Japanese notification of Feb. 10, 1904, classes horses as provisional contraband, an undoubted concession to neutral trade.[2] Russia, on the other hand, classes horses as absolute contraband, though she had previously insisted upon free trade in horses, and expressly struck out horses from the list of contraband in a treaty with England in the eighteenth century. Grotius, in one place, indicates that a nation is apt to regulate its lists of contraband not only by the necessities of its opponents, but according to its own, and we may perhaps construe the policy of Russia in the light of the fact that she never required horses for military purposes, owing to her abundant supply.

[1] Valin, "Ordonnance de la Marine," ii. 264.

[2] *Times*, March 1, 1904.

CHAPTER XIV.

INTERNATIONAL ARBITRATIONS, THE HAGUE CONVENTION, AND INTERNATIONAL INCIDENTS EXHIBITING ANALOGY TO THE NORTH SEA CRISIS, WITH A HISTORY OF THE NORTH SEA INCIDENT.

1.—Principles of International Arbitration.

Mr. W. E. Hall on conditions of successful arbitration.

Mr. W. E. Hall observes that recourse to international arbitration will be successful where the matter at stake is unimportant, when the issue is one of fact, when there is good faith on both sides, and the arbitrator can be trusted to be equitable.[1] But he points out that the rejection by the United States in 1831 of the award given against it in the British-American boundary dispute of that year shows how little calculated the method is to put an end to disputes of any magnitude unless honesty of intention exists on every hand.[2] It is interesting at this moment to reflect, in view of the great Hague Peace Convention of 1899, that a scheme of arbitral procedure drawn up by a Committee of the Institute of International Law was adopted at the meeting of the Institute held at the Hague in 1875.[3] Vattel observes—[4]

Scheme of arbitral procedure drawn by Institute of International Law, 1875.

Vattel on arbitration.

"When sovereigns cannot agree about their pretensions, and are, nevertheless, desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators; they have engaged

[1] "International Law," 5th ed., c. xi. pp. 362–4.

[2] Ibid., p. 364, and author's note.

[3] Cf. "Annuaire de l'Institut de Droit International" for 1877, pp. 123–133.

[4] "Droit des Gens," l. ii. c. xvii. s. 329.

to do this, and the faith of treaties should be religiously observed. If, however, the arbitrators, by pronouncing a sentence evidently unjust and unreasonable, should forfeit the character with which they were invested, their judgment would deserve no attention; the parties had appealed to it only with a view to the decision of doubtful questions. Suppose a board of arbitrators should, by way of reparation for some offence, condemn a sovereign State to become subject to the State she has offended, will any man of sense assert that she is bound to submit to such decision? If the injustice is of small consequence it should be borne for the sake of peace; and if it is not absolutely evident, we ought to endure it as an evil to which we have voluntarily exposed ourselves. For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators.

"There is no reason to apprehend that, by allowing the parties a liberty of refusing to submit to a manifestly unjust and unreasonable sentence, we should render arbitration useless; our decision is by no means repugnant to the nature of recognizances or arbitration articles. There can be no difficulty in the affair, except in case of the parties having signed vague and unlimited articles, in which they have not precisely specified the subject of the dispute, or marked the bounds of their opposite pretensions. It may then happen, as in the example just alleged, that the arbitrators will exceed their power, and pronounce on what has not been really submitted to their decision. Being called in to determine what satisfaction a State ought to make for an offence, they may condemn her to become subject to the State she has offended. But she certainly never gave them so extensive a power, and their absurd sentence is not binding. In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators, and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality."

"Arbitration is a very reasonable mode, and one that is

perfectly conformable to the law of nature, for the decision of every dispute which does not directly interest the safety of the nation. Though the claim of justice may be mistaken by the arbitrators, it is still more to be feared that it will be overpowered in an appeal to the sword. The Swiss have had the precaution in all their alliances among themselves, and even in those they have contracted with the neighbouring Powers, to agree beforehand on the manner in which their disputes were to be submitted to arbitrators, in case they could not adjust them in an amicable manner. This wise precaution has not a little contributed to maintain the Helvetic republic in that flourishing state which secures her liberty, and renders her respectable throughout Europe."

Vattel and Mr. W. E. Hall confine the province of arbitration to relatively unimportant questions.

The concluding words of this passage show that the Swiss, in the eighteenth century, anticipated the formation of a Peace Tribunal such as that formed at the Hague in 1899. Vattel, moreover, like Mr. W. E. Hall, points out that the true function of international arbitration is confined to the decision of disputes which do not directly concern the safety of the nation.

Sir H. S. Maine's objections to arbitration in 1887.

Sir H. S. Maine, in his discussion of the subject of international arbitration, considers that it is open to the following objections :—

(1) That it is wanting in the irresistible coercive power of municipal tribunals ;

(2) That England is an unpopular litigant in the forum of nations ;

(3) That jurists who make a special study of international law are an extinct class in this country, while on the continent they are the salaried functionaries of foreign chanceries, and therefore that international quasi-courts of arbitration are not always satisfactorily constituted ;

(4) That international quasi-courts of arbitration are constituted *ad hoc*, and do not exercise any continuous jurisdiction, and, therefore, that it is quite uncertain what weight is to be attached to the award of international arbitrators ;

(5) That the Geneva arbitration, which was perhaps the greatest of all arbitrations, introduced uncertainty into international law if it did not actually alter it for the worse by imposing additional obligations on neutrals ;

(6) International arbitrations, judging from the Geneva arbitration, are not likely to sufficiently safeguard the rights of neutrals, and this tendency will have the effect of enlarging the area of maritime wars.

Vattel, Mr. W. E. Hall, Sir H. S. Maine confine the province of arbitration to questions of fact.

Sir H. S. Maine further suggests that arbitration in international questions, like arbitration in municipal law, is almost necessarily confined to questions of fact. It is noticeable that the issue of the Geneva Conference turned on an issue of law, whether a nation was bound to use due diligence to prevent the equipment and outfit in its territorial waters of a vessel intended for the military or naval service of a belligerent. The famous sixth Article of the Treaty of Washington declared such a neutral duty to exist, and therefore withdrew from the Conference of Geneva the deliberation of the only question of international law which could determine the facts. In fact, therefore, the element which rendered the Geneva award both dangerous and reactionary was the unsound direction of law contained in the previous Treaty of Washington. But this mistake was not repeated, or at all events not in the same degree, in any of the international arbitrations which succeeded the Geneva Conference.

The Geneva Conference turned on a question of law.

A court of continuous jurisdiction now exists at the Hague.

Since the formation of international tribunals with continuous jurisdiction under the Hague Convention, it is unlikely that a mistake like the submission by Great Britain to the Treaty of Washington, 1871, will be repeated. A permanent court of arbitration can obviously be better trusted to adjust its awards to the entire body of international principles, distinctions, and rules than occasional adjudicators like those composing the arbitration court which sat at Geneva, 1871–2. How little the decisions of the Conference of Geneva were guided by a regard for the principles of international law can be inferred from Sir A. Cockburn's summary of the reasoning of M. Stæmpfli, the president, that there was no such thing as international law, because the practice of nations has undergone great changes at times, and the views of jurists on points of international law have often been, and still are, conflicting.[1]

Sir H. S. Maine points out that famous writers are apt to

[1] Cf. Halleck's "International Law," vol. ii. p. 159.

be strongly affected by their official connection with their respective Governments, and by their knowledge of the interest which they suppose their Governments to have in the establishment, maintenance, or development of particular features of the international system. There are, however, as well in Russia as elsewhere, men superior to national prejudice. Professor T. E. Holland, in a letter addressed to the *Times* on the subject of the destruction of the *Knight Commander*,[1] recalled the integrity of the Russian jurist, M. de Martens. In his book on International Law, published some twenty years ago, M. de Martens pointed out that the distance of her ports from the scenes of naval operations often obliged Russia to sink her prizes, so that "ce que les lois maritimes de tous les états considèrent comme un moyen auquel il n'y a lieu de recourir qu'á la dernière extremité, se transformerera pour nous en regle normale," foresaw "cette mesure d'un caractère gènèral soulevera indubitablement contrè notre pays un mécontentement universel." This outspoken expression of opinion may, for its learned integrity, be compared to the refusal of the Law Officers of the Crown, during the American Civil War, to institute proceedings in the case of the *Alabama*.

Professor de Martens presided over an arbitration tribunal which is recalled by the learned editor of Hall's "International Law" as one of the two most successful arbitrations of modern times, and he was, in addition, an arbitrator in the Pious Fund Case, the first decision under the Hague Convention. It has been lately stated that the absorbing nature of his official duties prevented him from assisting at the International Tribunal which recently dealt with the North Sea crisis.

Criticism of Sir H. S. Maine in 1887, that international arbitrations do not safeguard the rights of neutrals.

The observation of Sir H. S. Maine that, judging from the Geneva Conference, international arbitrations do not sufficiently guard the rights of neutrals, and that this tendency is likely to have the effect of enlarging the area of future maritime wars, is a generalization of great interest. Historically, neutral obligation in maritime wars was more restricted than neutral

[1] *Times*, August 6, 1904.

obligation in land wars. The naval belligerent's rights were limited in the days when there was a restricted category of contraband, and when there was a tendency to assert an almost complete inviolability for the neutral merchant vessel on the high seas. In the great naval wars of the eighteenth century, though England seized the goods of an enemy on board the ship of a friend, continental jurisprudence favoured the doctrine of free ships, free goods. The tendency of wars to become more and more naval, noted by Lord Stowell, is not likely to be abated at this day, when there are many more important navies in the world than there were a quarter of a century ago. In the Russo-Japanese War we have seen the right of a maritime belligerent advanced to the highest possible limit. The tendency of international tribunals to favour the rights of maritime belligerents coincides with, and is perhaps caused by, the great increase in the number of States possessing important navies. Historically, when there was practically only one powerful maritime belligerent, England, it was consistent with the reason of the thing that, owing in part to the jealousy our ascendency provoked, the rights of neutrals at sea were far greater than those of a maritime belligerent. The marked tendency of modern times for belligerent maritime right to encroach on neutral maritime obligation follows naturally upon the multiplication of navies.

Tendency to resort to arbitration coincides in time with increase of naval power throughout the world.

Calvo[1] gives a list of twenty-one disputes settled by arbitration from 1794 onwards. Mr. John Bassett Moore, in his "History and Digest of the International Arbitrations to which the United States has been a party," has compiled a list of arbitral decisions in general up to the year 1898.[2]

Calvo and Moore's lists of arbitrations.

Mr. W. E. Hall's openly expressed opinion that arbitration is only successful when confined to relatively unimportant matters might well have occasioned anxiety at the time of the North Sea reference. It may, of course, be admitted with Mr. W. E. Hall's editor, that the arbitral method of settling international differences has acquired new authority from the dignity and ability which marked the course of the proceedings in the Behring Sea Fur Seal Fisheries and the Venezuela

[1] Ss. 1489–1510.

[2] See pp. 4821, 4851 *et seq.*

boundary.[1] But in neither of these two instances of reference was the matter at stake of the first importance. The most successful instance of recent arbitration was King Edward's award in the case of the boundary dispute between Argentine and Chili. Arbitration is no doubt specially suited to decide boundary disputes.

The North Sea crisis was hardly a case where the matter at stake was unimportant, nor did it exhibit much analogy to the subject-matter of previous successful arbitrations. The outrage was a far worse insult to the flag than the case of the *Trent*, 1861, or that of the *Virginius*, 1873, had the latter vessel, as was at first believed, been entitled to fly the American flag. In the case of the *Trent* the Powers were unanimous in sustaining, through their ambassadors at Washington, the demands of Great Britain.[2] Without in any way disparaging the satisfactory sequel of the North Sea crisis under the rules of the Hague Convention, it would have been even more satisfactory if the Powers had acted in 1904 as they acted in 1861.

Powers ought to have made representations to Russia as they did to the Federals in 1861.

The case of the *Trent* turned on the question whether persons can be contraband. In the case of the *Bundesrath*, and the other German ships in 1899, the British Government acted on the view that military persons can be contraband, contrary to the opinion of the late Mr. W. E. Hall. But where the law of contraband is involved, the doctrine of the territoriality of the merchant vessel has no application. It was because of the irrefragable nature of the right of a belligerent to intercept contraband *in transitu* that Historicus, in an amusing passage, declared that a merchant vessel on the high seas in time of war no more resembled territory than Hamlet's cloud was like the weasel or the whale. So far from a merchant vessel on the high seas in time of war being like territory, and therefore inviolable, Historicus observed that the real truth was that it was not like territory, because it was violable. But the action of the Russian Baltic Fleet in the North Sea did not involve any construction of the belligerent right of search. It involved, on the other

[1] Hall's "International Law," p. 364.

[2] Wheaton, ed. 1904, p. 179.

hand, and most directly, the inviolability and immunity of persons and property belonging to a neutral State, under circumstances which afforded no pretext for belligerent interference. And a question of this importance was raised, *pendente bello*, during a great war, and a war in which the fury of fighting has unfortunately even more than vindicated the misgivings of Mr. W. E. Hall. Even the week of battles round Metz must yield, as far as the sacrifice of life is concerned, to the battle of the Shaho, if not to that of Liao-Yang. It is certain that both those battles involved a greater loss of life than that which occurred at St. Privat, and Port Arthur has witnessed worse scenes than Bazeilles. The moment did not appear favourable for a recourse to arbitral methods, and the success of the North Sea reference was therefore all the more gratifying.

2.—Some Account of Recent International Arbitrations.

Important arbitrations from Treaty of Washington to present time.

The arbitration which first demands notice is the Geneva Conference, which arose out of the *Alabama* claims. Mr. W. E. Hall regards the Geneva Conference as the most important case of arbitration which has yet occurred (1888), but he adds that both its proceedings and issues were little calculated to enlarge the area within which confidence in the results of arbitration can be felt.[1] The *Alabama* case and its developments suggest that when an infraction of neutrality is alleged, war may often be more successfully averted by the efforts of an ambassador than by arbitration. There can be no doubt of the sincerity and strenuousness of the efforts of Mr. Adams to keep the peace between the two countries, and he has himself testified to the difficulty of the task. But the success which attended his efforts was obviously in no way due to the submission of the *Alabama* claims to arbitration ten years after the vessel cleared from Liverpool. In this country, at all events in legal circles, the award of the Conference of Geneva was not foreseen. But none of the disadvantages under which

[1] "International Law," 364.

Great Britain recently proceeded to arbitration can be compared to those attending her appearance at the Geneva Conference with a previous consent to be judged by *ex post facto* rules, which put her out of court before the arbitration began.

The Conference of Geneva, 1872.

After thirty-two conferences, the president, M. Stæmpfli, in September, 1872, presented the decision of the Tribunal of Geneva, which was signed by Mr. Charles Francis Adams, Count Frederic Sclopis, M. Jacques Stæmpfli, and Viscount d'Itajubá, arbitrators. Four of the arbitrators found that Great Britain had failed in the case of the *Alabama* by omission to fulfil the duties prescribed by the first and third rules of the Treaty of Washington.[1] Sir Alexander Cockburn agreed, but differed in his reasons. A similar decision (four against one) was pronounced in the case of the *Florida*, under the second and third rules of the same articles. In the case of the *Shenandoah*, the tribunal held, unanimously, that Great Britain had not failed in any duty with respect to that vessel, prior to her arrival at the port of Melbourne, but (by majority of three against two, Count Sclopis and Sir A. Cockburn) that she had so failed after such arrival. As to the *Retribution*, that Great Britain had not failed, by three to two. As to the *Georgia*, the *Sumter*, the *Nashville*, the *Tallahassee*, and the *Chickamauga* respectively, the same finding was unanimously reached. And by a majority of four voices against one, they awarded to the United States a sum of 15,500,000 dollars in gold, for the satisfaction of all the claims referred to the consideration of the Tribunal, conformably to the provisions contained in Article VII. of the said treaty.[2]

The San Juan award of Emperor William I. of Germany, 1872.

In 1872 negotiations were conducted between Great Britain and the United States with the view of determining the ownership of the Island of San Juan, which lies in the very middle of the channel which separates the continent from Vancouver's Island. The Island of San Juan is somewhat larger than the Isle of Wight, and is surrounded by several smaller islets. Previous treaties on the subject—the Treaty of Ghent, 1814, and Lord Ashburton's Treaty, the Treaty of

[1] Cf. "The Annual Register" for 1871, p. 294.
[2] Ibid., 1872, pp. 109, 110.

Washington, 1846—had referred to the middle of the channel in which San Juan is situate, but had not specifically assigned it to either Great Britain or the United States. In 1851, a United States officer, General Harvey, attempted to carry the point by *coup de main* by occupying San Juan with an armed force. Afterwards the Americans withdrew this unjustifiable step and a joint occupation was agreed upon. The island then gradually acquired an increased importance to both Great Britain and the United States by the colonization of Vancouver's Island and British Columbia.

By the 34th Article of the Treaty of 1871, it was determined that "the respective claims of the two Governments should be submitted to the arbitration and award of Emperor William I. of Germany, who should decide thereupon, finally and without appeal, which of the said claims is most in accordance with the true interpretation of the Treaty of Washington, June 15, 1846. The Emperor delivered his award in December, 1872, unreservedly in favour of the American claim, which was that the line of the forty-ninth parallel of latitude should be continued to the middle of the channel which separates the continent from Vancouver, and thence southerly through the middle of the channel and the straits of De Arro, or De Haro, between San Juan and Vancouver, to the Pacific Ocean.[1]

The Lorenço Marques award of Marshal Macmahon, 1875.

A brief account may be given of the award by which Portugal acquired Lorenço Marques and Delagoa Bay, which acquired such importance during the Transvaal War. In 1835 the discontented Boers under Ohrich had attempted to form a settlement on the bay, and in 1868 the Transvaal president, Martin Wessel Petronius, incorporated the country on each side of Umzati down to the sea. The whole matter in dispute between the three Powers, Portugal, Great Britain, and the Transvaal was submitted to the arbitration of M. Thiers, the French President, and on April 19, 1875, his successor, Marshal Macmahon, declared in favour of the Portuguese.

The Behring Sea Arbitration Tribunal, 1893.

In 1892 Great Britain preferred some claims against the United States in respect of the seizure of Behring Sea fishing

[1] "Annual Register," 1872.

vessels. The matter was referred to an international tribunal presided over by Baron de Courcelles. The tribunal sat at Paris, and Lord Hannen and Sir J. Thompson, K.C.M.G., were appointed arbitrators on behalf of Great Britain. The proceedings commenced at Paris in April, 1893, Sir Charles Russell, K.C., M.P., then Attorney-General, and afterwards Lord Chief Justice of England, appearing in support of British interests with the present Lord Chief Justice of England, Lord Alverstone. The award of the Behring Sea Arbitration Tribunal, issued in August, 1893, was in great measure favourable to the contention of the counsel appearing for Great Britain. The address of Lord Russell of Killowen on this great occasion is generally considered one of the greatest of his triumphs at the bar, and a tribute was rendered to his eloquence by Baron de Courcelles, the President of the Tribunal. As a result, the United States settled the British claims by a payment of six hundred thousand dollars.

The arbitration between Great Britain and Venezuela, 1898.

In March, 1898, Great Britain and Venezuela communicated the first part of the historical documents and maps in support of their respective claims in the boundary dispute between the two countries to Professor Martens, of St. Petersburg, the chief arbitrator. The British case was in eight large volumes with an immense atlas, and the Venezuelan in four volumes with an atlas. In August, each Government prosecuted a counter-case against the first arguments and historical papers of its opponent. Venezuela sent three new volumes, and Great Britain two large new volumes. In all, more than two thousand two hundred documents in the English, Spanish, and Dutch languages were communicated to the members of the Arbitration Court, which it was arranged should meet at Paris to hear the verbal arguments and give the final decision.

In the early days of October, 1899, within a week before the issue of the Boer ultimatum, an arbitration tribunal, sitting in Paris, composed of American and English judges, with M. Martens, presiding, gave judgment unanimously in the matter of this long-standing territorial dispute. The decision was substantially in favour of this country, and authorized the inclusion within British Guiana of the great bulk of the

territory embraced by what is known as the Schomburgh line. The only exception of any note to this sweep of the award lay in the fact that it assigned to Venezuela a settlement at Barima Point, on the delta of the Orinoco, to which, on strategical grounds, the Venezuelans had always attached high value. From the British point of view, Venezuela being what she was, the new acquisition of the tract in question could not be considered of importance. On more than one occasion British Governments had offered Venezuela, by way of settling the difficulty, more than the Paris award gave her. The settlement made by the Arbitration Tribunal leaves free for undisturbed development a territory believed to possess considerable mineral wealth, and already administered for several years on British lines.[1]

The arbitral award of King Edward VII. in the territorial dispute between Argentine and Chile, 1902.

It is observed in the "Annual Register"[2] that the most important event for the Argentine Republic and Chile was the settlement of the boundary dispute under the reference to the arbitrament of the British Sovereign. Early in the year Sir Thomas Holdich and a staff were dispatched to survey the Southern Andes, where they spent several months, returning to England in the autumn. The award of King Edward was issued on November 27, and for the purposes of reference the geographical points may be placed in record—

"*Article I.*—The boundary in the region of the San Francisco Pass shall be formed by the line of water-parting extending from the pillar already erected on that pass to the summit of the mountain named *Tres Cruces.*

"*Article II.*—The basin of Lake Lacar is awarded to Argentina.

"*Article III.*—From Perez Rosales Pass, near the north of the lake Nahael Huapi, to the vicinity of Lake Viedma, the boundary shall pass by Mount Tronador, and thence to the river Palena by the lines of water-parting determined by certain obligatory points which we have fixed upon the rivers Manso, Puelo, Fetaleufa, and Palena (or Carrenleufu), awarding to Argentina the upper basin of those rivers above the points which we have fixed, including the valleys of Villegas, Nuevo, Cholila, Colonia de 16 Octubre, Frio, Huemules, and Corcovado, and to Chile the lower basins below these points. From the

[1] "Annual Register," 1899, p. 235. [2] Ibid., 1902, pp. 458-60.

fixed point on the river Palena the boundary shall follow the river Encuentro to the peak called Virgen, and thence to the line which we have fixed crossing Lake General Paz, and thence by the line of water-parting determined by the point which we have fixed upon the river Pico, from whence it shall ascend to the principal water-parting of the South American Continent at Loma Baguales, and follow that water-parting to a summit locally known as La Galera. From this point it shall follow certain tributaries of the river Simpson (or southern river Aisen) which we have fixed, and attain the peak called Ap Ywan, from whence it shall follow the water-parting determined by a point which we have fixed on a promontory from the neutral shore of Lake Buenos Aires. The upper basin of the river Pico is then awarded to Argentina, and the lower basin to Chile. The whole basin of the river Cisnes (or Frias) is awarded to Chile, and also the whole basin of the Aisen, with the exception of a tract at the head waters of the southern branch, including a settlement called Koslowsky, which is awarded to Argentina. The further continuation of the boundary is determined by lines which we have fixed across Lake Buenos Aires, Lake Pueyrredon (or Cochrane), and Lake San Martin, the effect of which is to assign the western portions of the basins of those lakes to Chile and the eastern portions to Argentina, the dividing ranges carrying the lofty peaks known as Mountain San Lorenzo and Fitzroy. From Mount Fitzroy to Mount Stokes the line of frontier has been already determined.

"*Article IV.*—From the vicinity of Mount Stokes to the fifty-second parallel of south latitude, the boundary shall first follow the continental water-parting defined by the Sierra Baguales, diverging from the latter southwards across the river Vizcachas to Mount Cazador, at the south-eastern extremity of which range it crosses the river Guillermo, and rejoins the continental water-parting to the east of Mount Solitario, following it to the fifty-second parallel of south latitude, from which point the remaining portion of the frontier has already been defined by mutual agreement between the respective States.

"*Article V.*—A more detailed definition of the line of frontier will be found in the report submitted to us by our tribunal, and upon the maps furnished by the experts of the Republics of Argentina and Chile, upon which the boundary which we have decided upon has been delineated by the members of our tribunal and approved by us.

"Given in triplicate, under our hand and seal, at our Court of St. James', this 20th day of November, 1902, in the second year of our reign.

"EDWARD R. AND I."

The writer in the "Annual Register" notes the fact that the award was represented to be satisfactory to both sides. Chile considered that she had obtained the larger portion of the disputed territory, while Argentina thought the richer and more valuable lands had fallen to her. Meanwhile, an important treaty had been arranged between the parties consolidating good relations. It provided that all future disputes should be referred to the arbitration of the British Government, or, in the event of a rupture with Great Britain, to the Swiss Government.

Regarded as satisfactory to both parties.

In October, 1902, King Oscar of Sweden, who was accepted by Great Britain, the United States, and Germany to assess the damages to foreigners in Samoa, arising from the landing of American and British troops, and from the destruction of British and American property by the rebels, decided that Great Britain and the United States were liable because they were not justified in landing troops. This decision aroused great irritation in the United States, as it was the enunciation of a principle which, if accepted as a precedent, would seriously restrict the assertion of American rights in foreign countries in case of revolution or riots, in which the lives and property of American citizens were placed in peril, and would practically disable a Government from protecting its own citizens when the local Government was powerless or unwilling to afford protection. The United States expressed its willingness to pay whatever damages might be assessed, but it refused to be bound by the principle, or to recognize it as a precedent which might be incorporated into the laws of nations.

Samoan award of King Oscar of Sweden, 1902.

The learned editor of Hall's "International Law" observes that the tribunal in the case of the disputed Alaskan boundary was in all essentials a court of arbitration, though its constitution was unusual. The manner in which the United States chose to construe the term "impartial jurists of repute" was, he observes, a serious blot on the proceeding. This criticism recalls that of Sir H. S. Maine on the composition of courts of international arbitration.[1]

Alaskan Boundary award, 1903.

Among the arbitrators of the Alaskan boundary dispute

[1] "International Law," Lecture xii., pp. 214, 215.

Lord Alverstone was the Commissioner representing Great Britain, while Sir Louis Jetté, K.C., of Quebec, and Mr. A. B. Aylesworth, K.C., of Toronto, were the Canadian Commissioners. The principal matter with which the tribunal dealt was the interpretation of the treaty of 1825 between Great Britain and Russia. The effect of the Alaskan Boundary decision was, in brief, to exclude the Canadians from all the ocean inlets as far as the Portland Channel, thus cutting them off from the water approaches to the Yukon and other goldfields, and, in the case of the channel just mentioned, to assign the two outer and smaller islands, Kannagunat and Sitklau, to the United States, but the two inner and larger islands, Pearse and Wales, to Canada. In the main it was regarded as a very unfavourable decision for Canada, and the Canadian members of the tribunal refused to sign the award. Though the immediate effect of the decision was to bring about a serious feeling of irritation in the minds of the Canadians, this sentiment was, to some extent at any rate, modified by the publication of the careful statement by Lord Alverstone of the reasons which led him to arrive at the conclusions which he adopted, both as to the true course of the Portland Channel, and as to the other questions involved.[1]

Fishery dispute between United States and Russia, 1902.

In 1902 Dr. Asser, the Hague jurist, presided over a fishery dispute between the United States and Russia. The machinery of the Hague Convention of July 27, 1899, was not employed on this occasion. This circumstance called forth a protest from Baron D'Estournelles de Constant and others. The facts out of which the dispute between the United States and Russia arose were, that in 1891 some American whalers were overtaken and captured by a Russian schooner in Behring Sea, in violation, it is said, of the ordinary rules of sea fishing. Not only did the cruiser capture the vessels, but, being short of hands, compelled the American seamen to work under a very severe *régime*. The United States lodged a formal complaint, and claimed damages on various accounts, including, in addition to the value of the whalers, compensation for the crews, and also the prospective profits to officers accruing from the

[1] "Annual Register," 1903, p. 438.

expedition. The Russian defence was based on the *droit de necessité*, because the whalers had knowingly transgressed their proper limits. It seems an inference from Vattel[1] that the plea of inevitable necessity is one that can only be raised in a state of war.

The Annual Register for the last two years contains no notice of this case. It must, therefore, be supposed that Dr. Asser has not delivered his award.

3.—The Hague Peace Conference, 1899.

Names of States accepting invitation to Hague Conference, 1898.

The invitation of the Tzar in 1898 to the International Peace Conference, was accepted by Germany, Austria, Belgium, China, Denmark, Spain, the United States, Mexico, France, Great Britain, Greece, Italy, Japan, Luxembourg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria; and in the spring of 1899 the Conference duly assembled at the Hague. Great Britain was represented by Sir Julian (afterwards Lord) Pauncefote and Sir Henry Howard, with Vice-Admiral Sir John Fisher, and Major-General Sir John Ardagh as technical delegates; the United States by Messrs. M. White, Stanford Nevill, Seth Low, Captain Mahan, and Captain Crozier. From May 18 to July 29 the International Peace Conference, as it was designated, held continual session, the members being divided for greater convenience into three commissions, to deal with the various topics propounded. The labours of the Conference to formulate a scheme for the gradual reduction of existing armaments, and for checking any further increase, were doomed to failure from the first.

Session of International Peace Conference, May–July, 1899.

Proposals at.

But a convention for the adaptation to maritime warfare of the principles of the Geneva Convention was signed by representatives of the following Powers:—Germany, Austria, Belgium, China, Denmark, Spain, the United States, Mexico,

[1] "Droit des Gens," l. iii. c. 7.

France, Great Britain, Greece, Italy, Japan, Luxembourg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria.

The representatives of all the States assembled at the Hague Peace Conference of 1899, with the exception of China, signed a convention, based to a large extent on the Declaration of Brussels, concerning the laws and customs of land warfare.

The final act of the Hague Peace Conference contained three declarations, which prohibit on the part of the contracting Powers—

(1) For a period of five years the launching of projectiles from balloons or by other similar new methods;

(2) The use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases;

(3) The use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

None of these declarations was signed by the British representatives, and only the first of them by the United States.

It is observed by the learned editor of Hall's "International Law" that the second of the three declarations of the final act of the Hague Peace Conference was presumably aimed at lyddite.[1]

4.—The Convention for the Pacific Settlement of International Disputes signed at the Hague Conference.

Convention for pacific settlement of international disputes signed at the Hague.

At the moment, in view of the North Sea incident, the greatest interest attaches to the convention for the pacific settlement of international disputes which was signed on July 29, 1899, by the representatives of twenty-four of the States assembled at the Hague. Apparently the only Powers

[1] Hall's "International Law," 5th ed., p. 533.

attending the Hague Peace Conference who did not ratify this convention are Turkey and China, who, however, appear among the signatories. The adhesion of Turkey to the principle of arbitration was clogged by a declaration which robbed it of all value;[1] the course of events in China since the summer of 1899 is sufficient explanation for the non-appearance of that country. The Republics of Salvador, Guatemala, and Uruguay, as well as the Empire of Corea, have subsequently requested to be admitted to the benefits of the convention. The fact that the Empire of Corea has applied to be admitted to this convention for the pacific settlement of international disputes, recalls the anomalous status of that country during the Russo-Japanese War. As has been seen, Corea, previous to the commencement of the war, issued a declaration of neutrality. Yet, at the very commencement of the war, she concluded a convention with Japan, by which she was universally considered to have become a protectorate of Japan. A convention of later date, ratified some months after the commencement of hostilities between Russia and Japan, places this fact beyond any apparent doubt. Corean troops further seem to have come into conflict with Russian troops, though Japan has, for motives that can doubtless only be appreciated by those who have an intimate knowledge of the political environment, insisted on a great reduction of the Corean army.

Convention signed by twenty-four States.

Que. as to Turkey and China.

Other accessions.

5.—International Commissions of Inquiry under Title III. of the Convention for the Pacific Settlement of International Disputes.

The text of Title III. of the Convention for the Pacific Settlement of International Disputes signed at the Hague is as follows:—

International Commissions of Inquiry under Title III. of Convention of July, 1899.

"*Title III.*—On International Commissions of Inquiry.

"*Article IX.*—In differences of an international nature, involving neither honour nor vital interests, and arising from a

Terms of Title III.

[1] "Nouv. Rec. Gén.," l. c. p. 737.

difference of opinion on points of fact, the Signatory Powers recommend that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an International Commission of Inquiry to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

"*Article X.*—The International Commissions of Inquiry are constituted by special agreement between the parties in conflict. The convention for an inquiry defines the facts to be examined and the extent of the Commissioners' powers. It settles the procedure. On the inquiry both sides must be heard. The form and the periods to be observed, if not stated in the Inquiry Convention, are decided by the Commission itself.

"*Article XI.*—The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article XXXII. of the present convention.

"*Article XII.*—The Powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question.

"*Article XIII.*—The International Commission of Inquiry communicates its report to the conflicting Powers, signed by all the members of the Commission.

"*Article XIV.*—The report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an arbitral award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.

"*Article XXXII.*—Referring to the formation of the International Commission of Inquiry is as follows:—

"The duties of arbitrators may be conferred on one arbitrator alone or on several arbitrators selected by the parties, as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Act. Failing the constitution of the tribunal by direct agreement between the parties, the following course shall be pursued. Each party appoints two arbitrators, and these latter together choose an umpire. In case of equal voting, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord. If no agreement is arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.".

Speech of Mr. A. J. Balfour, Oct. 29, 1904.

Mr. Balfour, in his speech at Southampton on the subject of the North Sea crisis, alluded in the following terms to the pending international inquiry:—

"An inquiry will be instituted into the facts, and we and the Russian Government are agreed upon an international commission of the kind provided for by the Hague Convention—I should say that that has nothing to do with arbitration, that is, the constitution of an International Commission to find out facts—and any person found guilty by this tribunal will be tried and adequately punished."[1]

It is, therefore, clear, from the Prime Minister's language, that the reference of the North Sea incident is to an International Commission of Inquiry under Title III., and not to the Permanent Court of Arbitration constituted under the succeeding title of the Hague Convention, July 29, 1899. This fact is of some importance. An International Commission of Inquiry has, as has been seen,[2] in no way the character of an arbitral award. It resembles a preliminary finding of fact such as is ordered in some cases in English law,[3] or the *actio præjudicialis* of the Roman law. Such a commission is even more wanting in "irresistible coercive power" than an international arbitration before the Hague Convention.[4] Its province being merely to define fact, this want of coercive force possibly constitutes no objection. But it remains clear that the ruling of the commission cannot possibly be decisive, and that its finding might quite logically lead, either to a reference to the Permanent Court of Arbitration, which would then specifically adjudicate upon the facts raised by the Commission of Inquiry, or else to war. By Article 14, the Report of the International Commission of Inquiry is "to leave the conflicting parties entire freedom as to the effect to be given" to its statement. It can hardly be supposed that both this country and Russia will draw the same inference from the facts found by the International Commission, seeing that they are now at entire variance. It is only on what seems to be the most improbable result, that both countries should concur alike in the facts and the inference, that the Report of the Commission of Inquiry seems destined finally to solve the issue.

[1] *Times*, Saturday, October 29, 1904.
[2] Tit. iii. Art. 14.
[3] *Drummond* v. *Van Ingen*, (1887) 12 A. C. 284.
[4] Maine, Lecture xii., p. 213.

Difference between report of International Commission of Inquiry and an arbitral award.

The following are the most important differences between an International Commission of Inquiry and the Permanent Court of Arbitration:—

(1) The Arbitration Convention implies an engagement to submit loyally to the award (Article 18). The Report of an International Commission of Inquiry leaves the conflicting Powers entire freedom as to the effect to be given to the statement it makes (Article 14).

(2) The International Commissions of Inquiry are constituted by special agreement between the parties, whereas the Permanent Court shall be competent for all arbitration cases unless the parties agree to institute a special tribunal.

(3) The Permanent Court of Arbitration decides questions of law and fact, whereas an International Commission of Inquiry decides only questions of fact.

(4) The Powers who have recourse to arbitration sign a special act (*compromis*), which is a document of the court itself. But a reference to an International Commission of Inquiry is preceded by a convention between the two parties. This course has been adopted since the institution of the Hague Court, in a case where a reference, involving issues of law and fact, was made to arbitration without any appeal to the Hague Court.

(5) Reference to an International Commission of Inquiry must be voluntary, by the conflicting parties themselves, under the terms of a convention. The signatory Powers, on the other hand, may recommend two or more of their number, between whom a serious dispute has broken out, to appeal to the Permanent Court of Arbitration, and such a reminder is only to be regarded as a friendly act (Article 27).

(6) The forms and procedure of a reference to the Permanent Court of Arbitration are settled by the articles of the Hague Convention (Articles 39-57). The forms and periods to be observed by an International Commission of Inquiry under Title III. of the Hague Convention, if not stated in the inquiry convention, are decided by the commission itself (Article 10).

(7) The Permanent Court of Arbitration sits at the Hague,

in the absence of any special agreement by the parties. Where there is such special agreement the tribunal may, in cases of necessity, alter the place fixed by the parties (Article 36). The articles of Title III. of the Hague Convention, relating to International Commissions of Inquiry, provide nothing on this subject.

(8) A tribunal sitting as members of the Permanent Court of Arbitration decides on the choice of languages to be used by itself, and to be authorized for use before it (Article 38). Title III., relating to International Commissions of Inquiry, provides nothing on this subject.

(9) When an arbitrator dies, his place is filled in accordance with the methods of his appointment (Article 35). Nothing is provided on this head as regards Commissions of Inquiry.

(10) There can be a revision of the award of the Permanent Court of Arbitration. Revision can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence in the award, which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision (Article 55). There are no provisions in Title III. rendering possible a revision of the Report of an International Commission of Inquiry.

(11) There are no rules relating to evidence, or the expenses of an International Commission of Inquiry. In the case of an arbitral award each party pays its own expenses and an equal share of those of the tribunal.

All these material differences between a tribunal which sits as a branch of the Permanent Court of Arbitration under the Hague Convention (Title IV.), and an International Commission of Inquiry under Title III., result from the fact that the only articles of the convention which relate to procedure deal with "arbitral procedure" (except Article 32, which provides either for the appointment of arbitrators or commissioners), and by Article 14 the Report of an International Commission of Inquiry "has in no way the character of an arbitral award." In the case of an International Commission of Inquiry under Title III. "the forms and periods" to be observed may be settled either by the inquiry convention or

by the commission (Article 10). There is nothing in the convention as to the payment of the expenses of the commission or of the parties under Title III., the title which relates to International Commissions of Inquiry. The question of expenses, probably one of very considerable importance, may presumably be settled by the inquiry convention or by the commission. As regards "forms and periods" in the case of an International Commission of Inquiry, these may be regulated by the commission, but are primarily regulated by the inquiry convention.

It may be noted that neither arbitrators nor commissioners are necessarily selected from the members of the Permanent Court of Arbitration established by the Hague Convention. On the other hand, both commissioners and arbitrators may be so selected by the parties. If the parties so please, the reference may be to a single arbitrator or a single commissioner. The most material difference is that there is no revision possible of the Report of a Commission of Inquiry. But a statement of facts delivered by a commission under Title III. is as likely to be decisively influenced by the discovery of a new fact, unknown at the time a discussion closed, as an arbitral award under Title IV.

Apparent omission in Title III. as to effect to be given to discovery of a new fact.

6.—Cases before the Arbitration Court at the Hague.

Before alluding to the few cases which as yet have come before the Permanent Court of Arbitration at the Hague, it may be permissible to point out that the tendency of recent years to enter into agreements to submit to arbitration prospective differences, is due in no small degree to the Hague Convention. By Article 19 of the Hague Convention the Signatory Powers have reserved to themselves, both retrospective and prospectively, the right of extending obligatory arbitration to all cases that can possibly admit of it, by new agreement, which may be of a private nature. Thus, Article 3 of the Anglo-French Agreement of 1904 contains an agreement to refer to an arbitral tribunal which, however, is not the Permanent Court of the Hague, but a specially

International agreements to refer future differences to arbitration, an implicit consequence of Hague Convention.

The Anglo-French Agreement, 1904.

constituted tribunal, claims for indemnity of French citizens engaged in fishing on the treaty shore of Newfoundland, who are obliged to give up their occupation in consequence of the convention prohibiting French fishermen from fishing in the rivers of Newfoundland.[1]

Anglo-Portuguese Treaty of Arbitration, Nov., 1904.

The recent Anglo-Portuguese Treaty of Arbitration, signed at Windsor immediately before the State banquet, Wednesday, November 16, 1904, unlike the Anglo-French Agreement, specifically contemplates a reference to the Permanent Court at the Hague of any differences which arise between the contracting parties, provided that they do not affect the vital interests, independence, or the honour of the two contracting States. The first case brought before the Hague Court was the so-called Pious Fund Case, relating to church property in California and Mexico. The reference to the Hague Tribunal was largely due to the initiation of President Roosevelt, who, in this respect, to paraphrase the saying of Montesquieu, has played a leading part in the unveiling of the statues of Perpetual Peace.

The Pious Fund of the Californias Case.

When California belonged entirely to Mexico, President Quesada, being in need of money, laid hold of Californian Church property, and promised to pay a pension to the clergy. This promise was kept so long as California remained a Mexican province. But when the United States absorbed California they did not take over President Quesada's promise, and the Californian clergy claimed its money from Mexico, which refused it to the United States. Over a million dollars and the interest thereon were laid in the Mexican Treasury awaiting distribution. The arbitrators for the United States were Sir E. Fry and Professor de Martens. The arbitrators for Mexico were Judge Guarnschelli, of the Italian Court of Cassation, and Judge Lohman of Holland. After some little delay Senator Stewart began his pleadings before the Hague Court, sitting at the Hague, on behalf of the United States. The arbitral decision, which was unanimously delivered on October 14, 1902, was to the effect that Mexico was to pay to the United States the sum of 1,420,682 dollars, Mexican

[1] Article 2, Anglo-French Agreement, 1904.

currency; and Mexico was further directed to pay the United States for ever an annual sum of 43,051 dollars. It must be remembered that the Pious Fund was an arbitral award under a reference to the Permanent Court of Arbitration instituted under Title IV. of the Convention for the Pacific Settlement of International Disputes signed at the Hague, and not to an International Commission of Inquiry under Title III. The reference of the Dogger Bank incident is of the latter kind, as has been seen.

No commission or tribunal convened under the Hague Convention has yet specifically adjudicated on questions arising out of a state of war, though some attempt seems to have been made to invoke its interference in the Boer War.

The Venezuelan (preferential payments) arbitral award, Feb., 1904.

On February 23, 1904, the Hague Tribunal gave a decision in favour of preferential payment to England, Germany, and Italy in settlement of the claims against Venezuela. This decision was warmly and most justly commended by the German Press as a salutary warning to such States as may manifest an inclination to repudiate their financial obligations. A third reference to the Hague Tribunal is still pending, apart from the North Sea crisis. In this case the tribunal has been called upon to arbitrate on the difference which has arisen between Japan and England, France, and Germany as to the tax levied by the Japanese Government on buildings stipulated in the foreign concessions. The proceedings in the case of the Japanese house-tax seem somewhat open to the charge of dilatoriness, though this is possibly not to be imputed to the machinery of the Hague Convention. Thus, on December 10, 1902, it was stated in the *Times* that Sir John Ardagh, who was nominated a member of the International Court of Arbitration in place of Lord Pauncefote, nominated as arbitrator in the Japanese house-tax case M. Gram, member of the Court of Arbitration for Sweden and Norway. But the Hague Tribunal has apparently only just assigned a date for the hearing—November 21, 1904.

The Japanese house-tax case, 1902–4.

Inchoate references to Hague Court.

In 1902 various questions of a minor order were referred to the Hague Tribunal, which do not yet seem to have been decided, since the decision in the Venezuela claims, decided

February, 1904, was, though not the first, as asserted in the *Times*, apparently only the second case in which the court has adjudicated. Thus in July, 1902, there was a proposed reference to the terms of the sale by Denmark to the United States of the Island of St. Thomas, one of the Virgin group in the West Indies. It also seems that about that date Holland and Germany desired to submit a point of difference relative to submarine cables.

The conservatives in the Landsthing managed to frustrate the Government measure for the sale of the West India Islands, and hence the reference to the Hague Tribunal was defeated.[1] In 1902 the tribunal was occupied with administrative matters, and with a question of private international law. In February of that year Dr. Asser presided over a convention for the adjustment between the laws of various European countries of discrepancies with respect to questions of marriage, divorce, judicial separation, and the guardianship of minors. Great Britain was not a party to this convention, and Denmark and Russia seemed to have abstained from becoming signatories to the proposals mooted. They were, however, accepted by the great majority of European countries. It is, of course, strictly proper that an international tribunal should concern itself with questions of private international law.

Action of the Hague Court in the sphere of private international law.

7.—The Terms of the North Sea Convention, November 25, 1904.

The following are the terms of the North Sea Convention, signed at St. Petersburg on November 25, by his Majesty's ambassador, Sir Charles Hardinge, and Count Lamsdorff:—

Terms of the North Sea Convention between Russia and Great Britain, Nov. 25, 1904.

"His Britannic Majesty's Government and the Imperial Russian Government, having agreed to entrust to an International Commission of Inquiry—assembled conformably to Articles 9 to 14 of the Hague Convention of July 29, 1899, for the pacific settlement of international disputes—the task of

[1] "Annual Register," 1902, p. 353.

elucidating by means of an impartial and conscientious investigation the question of fact connected with the incident which occurred during the night of October 21–22, 1904, in the North Sea, on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of the fleet and injuries to the crews of some of those boats, the undersigned, being duly authorized, therefore have agreed upon the following provisions:—

"*Article I.*—The International Commission of Inquiry shall be composed of five members—Commissioners—of whom two shall be officers of high rank in the British and Imperial Russian navies respectively. The Governments of France and of the United States shall each be requested to select one of their naval officers of high rank as a member of the Commission. The fifth member shall be chosen by agreement between the four members above mentioned. In the event of no agreement being arrived at between the four Commissioners as to the selection of the fifth member of the Commission, his Imperial and Royal Majesty the Emperor of Austria, King of Hungary, will be invited to select him. Each of the two high contracting parties shall likewise appoint a legal assessor to advise the Commissioners, and an agent officially empowered to take part in the labours of the Commission.

"*Article II.*—The Commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the questions as to where the responsibility lies and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries in the event of their responsibility being established by the inquiry.

"*Article III.*—The Commission shall settle the details of the procedure which it will follow for the purpose of accomplishing the task with which it has been entrusted.

"*Article IV.*—The two high contracting parties undertake to supply the International Commission of Inquiry to the utmost of their ability with all the means and facilities necessary, in order to enable it to acquaint itself thoroughly with, and appreciate correctly, the matters in dispute.

"*Article V.*—The Commission shall assemble at Paris as soon as possible after the signature of this agreement.

"*Article VI.*—The Commission shall present its report to the two high contracting parties, signed by all the members of the Commission.

"*Article VII.*—The Commission will take all its decisions by a majority of the votes of the five Commissioners.

"*Article VIII.*—The two high contracting parties undertake each to bear on reciprocal terms the expenses of the inquiry made by it previous to the assembly of the Commission. The

expenses incurred by the International Commission after the date of its assembly in organizing its staff, and in conducting the investigations which it will have to make, shall be equally borne by the two Governments."

It is, perhaps, noticeable that as early as November 7 the *Times* published the terms of a draft Convention, which gave the substance of the above. It seems, however, probable that the second article gave rise to some discussion; and it appears a little difficult to understand how a Commission of Inquiry, whose report is *prima facie* limited to a statement of facts,[1] can establish responsibility as the North Sea Commission is required to do by Article 2 of the North Sea Convention. The Commission being an International Commission, and questions between nations being purely questions of international law, the responsibility that the Commission is convened to establish is a collective and national, not an individual, responsibility. The concluding words of the second article of the North Sea Convention are clearly framed for the contingency that an attack was made on the Baltic Fleet by Japanese torpedo-boats. The insertion of these words was, no doubt, due to Russian diplomacy.[2]

The following account was given in the *Times* of the *personnel* of the Commission:—

"The tact of Rear-Admiral Fournier was conspicuously shown in 1884 when, after the victories of Courbet, France had to obtain from China the renunciation of her pretensions over Hong-Kong. Commandant Fournier was pitted against the subtle Li-Hung-Chang, and yet he returned with a treaty in his pocket which completely satisfied his Government. Later he was placed in command of the French naval division in the Far East, a position which he only left to take the

[1] *Article XIV.*—Hague Convention. Parliamentary Papers show, since these words were written, that there was an enlargement of the scope of the Hague Convention consented to by both Powers, by which the Commission was, *sub modo*, empowered to decide questions of law as well as fact. The fact that the North Sea Commission was specially empowered to decide a question of law seems of some interest as affecting the question whether it could be drawn into a precedent for future International Commissions of Inquiry, to whom the reference will purely be one of fact in accordance with terms of Hague Convention.

[2] Since these words were written the Report of the Commissioners states that by a majority they arrived at the conclusion that there was no torpedo-boat either among the trawlers or on the spot. Cf. Article 13 of Report.

direction of the Higher Naval School. He has passed from one maritime perfecture to another, interrupting his administrative work ashore by periods of sea service, which have made the Mediterranean ports familiar with his flag. At present he is on a tour of inspection of the French North African naval bases. Rear-Admiral Fournier is the author of a brilliant study of 'Cyclones and Typhoons,' and the inventor of an instrument for the regulation of ship's compasses."[1]

Rear-Admiral C. H. Davis, who has been appointed by the President of the United States the American member of the Commission, is an officer of distinction and competence, who has seen much service at sea. During the Spanish War he was on active duty, and is familiar with European waters. He was lately appointed rear-admiral, and has been superintendent of the Naval Observatory, and has been concerned in various scientific expeditions.

Rear-Admiral Davis is a son of that Admiral Davis who was eminent in the Civil War.

The following are some incidents in the career of the British Commissioner:—

Beaumont, Vice-Admiral, Sir Lewis Anthony, K.C.M.G., 1901; F.R.G.S., Grand Officer of the Legion of Honour; born, May 10, 1847. Entered the Royal Navy, 1860; rear-admiral, 1897; served Arctic Expedition, 1875–76 (promoted, Arctic medal); naval *attaché* for Europe, 1882; private secretary to the Earl of Northbrook, 1883–85, as First Lord of the Admiralty and High Commissioner to Egypt, 1884; Director of Naval Intelligence, 1894-99; A.D.C. to Queen, 1895–97; Commander-in-Chief, Pacific, 1899–1900; Commander-in-Chief, Australia, 1901–3.

It has been reported that Admiral Dewey declined to serve on the Commission, and that Admiral Kaznakoff, who was appointed the Russian Commissioner so far back as November 2, has retired.

The following appeared in the *Law Times*, December 10, 1904:—

"The Right Hon. Sir Edward Fry, who has been appointed legal assessor on the International Commission of Inquiry into the North Sea catastrophe, shortly to meet in Paris,

[1] *Times*, December 1, 1904.

was a judge of the High Court, Chancery Division, from 1877 to 1883, and a lord justice of appeal from the latter year until 1892, when he retired on a pension. He is a member of the Permanent Court of International Arbitration at the Hague, a Fellow of the British Academy, and a member of the Historical Manuscripts Commission on the Irish Lands Acts, 1897–98, and he was chairman of the Court of Arbitration under the Metropolitan Water Act, 1902. Sir E. Fry is a Fellow of the Royal and other learned Societies, an LL.D. of Edinburgh, and a D.C.L. of Oxford."

It is necessary to supplement this notice of the career of Sir E. Fry by recalling the fact that he was nominated by President Roosevelt arbitrator for the United States, together with Professor de Martens, in the Pious Fund of the Californias case, the first, and perhaps the most interesting and important, case decided under a reference to the Permanent Court of International Arbitration, created by the Hague Convention July 27, 1899.

The following are some facts in the career of the British Secretary to the International Commission of Inquiry into the North Sea incident:—

Hugh James O'Beirne, J.P., D.L., Secretary at British Embassy, Paris, since 1900; born, Jamestown Drumsna, Co. Leitrim, September 7, 1866. Educated, Beaumont; Balliol Coll., Oxford; *attaché* at St. Petersburg, 1892; second secretary, Washington, 1895–98.

It has also been stated that Baron Von Taube of the Foreign Office is the Russian judicial adviser to the Commission, and the following were appointed Russian assessors on the Commission:—

Lieut.-Col. Stenger, Chief of the Scientific Section of the Ministry of Marine;
Lieut. Wolkoff; and
M. Mandelstam Second Dragoman of the Russian Embassy at Constantinople.

8.—The Reception of the News of the North Sea Incident in England.

Attitude of Great Britain on announcement of North Sea tragedy.

Letter of his Majesty.

The highest authority in the land denounced the conduct of the Russian fleet as "an unwarrantable action." In the course of one week the leaders of both political parties had denounced the butchery of English sailors off the Yorkshire coast in indignant language—Lord Rosebery, the Secretary of State for the Colonies, the First Lord of the Admiralty, the leader of the opposition, and, at the close of the week, the Prime Minister, all expressed themselves in a like sense. Lord Rosebery described the North Sea incident as "an unspeakable outrage." The Secretary of State for the Colonies, speaking at a political meeting at Leamington five days afterwards, referred to the tragedy as "either the result of a murderous intention or the result of wicked negligence."[1] Lord Selborne, at a political meeting in London, had previously declared that "an inexcusable outrage has been committed."

Statement of Lord Rosebery.

Of the Secretary of State for the Colonies.

Of Lord Selborne.

Of the Leader of the Opposition.

Perhaps no reference of any political leader to the North Sea incident reflected more faithfully public indignation than the terms in which Sir H. C. Campbell-Bannerman referred to it at Norwich. The Leader of the Opposition asked his audience—

> "What are we to say to the unparalleled and cruel outrage committed by a great fleet of war ships upon unoffending fishermen? Of course, if there was the slightest idea that this atrocious act was authorized, no language would be too strong, and no action too strong to reply to it."

It was necessary to discard that idea. Yet the action of the Russian fleet could neither be accounted for on the ground of accident, misunderstanding, or blunder. He did not doubt that the Russian Government would make an ample response. The speaker concluded—

[1] *Times*, October 26.

"But there will surely be some guarantee that in their future course round the world this fleet will obey the rules of international comity, of civilized warfare, and of simple humanity, which have been so wantonly infringed in this case. Our countrymen are absolutely agreed in supporting the demands of the Government, and are also agreed in the warm sympathy with the unfortunate victims of the occurrence." [1]

Speech of the Prime Minister.

It was reserved for the Prime Minister, at the close of the week, to allay the public excitement by announcing that international relations had once more become normal by the agreement to refer to an International Commission of Inquiry under the rules of the Hague Convention.

Continental parallel to the North Sea incident.

On the continent, the North Sea incident has been compared to the Schnæbelé frontier incident of 1887. It is, however, pronounced by the *Siècle* to be far less serious than the Schnæbelé affair, a conclusion which does not seem justifiable, at all events on the grounds of international law, and not, perhaps, on the ground of political importance. The two incidents do not seem at all *in pari materia* from the point of view of international law. They can only be compared because both at first seemed likely to precipitate war, and then became susceptible of arrangement.

The Schnæbelé affair, 1887.

The Schnæbelé incident is thus described in the "Annual Register," 1887, p. 247. The military measures taken by Russia at the end of 1886 had created general alarm for the peace of Europe, and it was remarked that in a formal letter of thanks which was addressed on New Year's Day by the German Emperor to his army, in return for their congratulations on the celebration of his eightieth anniversary of his entrance into military service, there was not a word expressing confidence in the maintenance of peace. The alarm was considerably increased by the news that a French police inspector, M. Schnæbelé, who was proceeding to Ars-sur-Moselle to interview the German police inspector there at the latter's request, had been arrested on the Franco-German frontier near Pâgny. The usual dispute followed as to whether the arrest had taken place on French or German soil, and the

[1] *Times*, October 26, 1904.

reason given by the German authorities for the arrest was that in an inquiry into charges of treasonable practices against a number of Alsatians, evidence had been produced that M. Schnæbelé was concerned in transmitting to Paris information as to German fortresses furnished by Alsatians in the pay of the French Government. Shortly after, however (April 28), M. Schnæbelé was released by order of the German Emperor, and in a despatch forwarded on the same day to M. Herbette, the French ambassador at Berlin, Prince Bismarck explained that, although the German Government considered that Schnæbelé's arrest, in view of the proofs of his guilt, was abundantly justified, it was expedient to set him at liberty on the general principle that business meetings of frontier officials "must always be regarded as protected by a mutually assured safe conduct." Another incident which produced much excitement at the time occurred on the Franco-German frontier on September 25. Five French sportsmen, accompanied by a number of keepers, were shooting at La Corbeille, a spot a few yards from the frontier, when a German soldier, who had been ordered to guard the German territory at this point, thinking that the French were poachers, called to them, and not receiving any reply, fired, killing one of the keepers and wounding one of the sportsmen below the knee. Here, too, there was a conflict as to whether the French party were on German territory when they were fired upon. The soldiers swore they were, and the French were equally confident they were not. The affair was ultimately settled by the German Government paying an indemnity of 50,000 francs to the keeper's widow and ordering the soldier to be tried for manslaughter.

La Corbeille incident, 1887.

£2000 compensation paid by German Government for French gamekeeper shot by German sentry.

The somewhat far-fetched parallel instituted by the *Siècle* between this affair and the North Sea crisis may be attributed to the political coincidence that the attitude of Russia was indirectly involved in the Schnæbelé affair. Perhaps it is even more material to note that both affairs occurred at a time when the international horizon was clouded, and therefore gave rise to great anxiety and excitement. The compromise arrived at in the Schnæbelé affair suggests that there were

faults on both sides. But the Hull fishermen, like the gamekeeper in the La Corbeille incident which occurred shortly after the Schnæbelé affair, were the innocent victims of a most regrettable incident. At no stage of the history of the North Sea incident does it appear that, even on the Russian view, any blame was to be attributed to the trawlers.

Implied from liberal compensation paid by German Government that compensation ought to be awarded on a liberal scale.

The only inference from these facts is that the Russian Government ought to award compensation on a most liberal scale to the families of the fishermen killed by the fire of the Baltic Fleet, and, what is of ultimate importance, that they ought to institute proceedings against those actually responsible for the outrages.[1] But these are the two fundamental points of the British claim against the Russian Government. The La Corbeille incident affords a very close parallel to the Warina incident of 1893, presently to be detailed. The differences are that in the latter case the military forces of one State attacked the military forces of a State with which the former was at peace in unoccupied regions where both were operating against an uncivilized foe. In the La Corbeille incident the party attacked were within the territory of the State to which they belonged. The important inference from both cases is that when the neutral subject attacked is where he has a right to be, the Government of the party attacking is liable, in any event, to compensate the person injured and may further be bound to institute criminal proceedings when there is a question whether the excuse of honest mistake is admissible. This conclusion has distinct relevance to the Baltic Fleet incident.

But, as Sir Henry Campbell-Bannerman observed at Norwich, the Russian action in the North Sea incident can hardly be accounted for either on the ground of accident, misunderstanding, or blunder. None of these excuses, *if proved to exist*, would avail to shield the Russian officers from criminal proceedings, and therefore the Russian Government, in the apparent absence of any explanation, might properly have been required to institute criminal proceedings against those officers of the Baltic Fleet who are actually concerned.

[1] Since these words were written the Baltic Fleet has been annihilated.

Contemporaneous statement of Lord Lansdowne. Nov. 10, 1904.

Lord Lansdowne, at the Guildhall banquet, some three weeks after the North Sea incident, made, perhaps, the most comprehensive reference to the affair which has been communicated to the public. It constitutes a complete survey of the history of the question, and must be supposed to be the authoritative statement of the attitude of the British Government.

Lord Lansdowne, as reported in the *Times*, observed—

"We agreed that the matter in dispute should be referred to a perfectly independent and impartial tribunal of an international character, and we invoked, and gladly invoked, the machinery provided by that memorable and most useful convention concluded at the Hague in 1899 as a result of a conference convened—and I beg you to remember it—on the initiation of the Emperor of Russia. We found no difficulty in arriving at a settlement of the question of principle—I mean the principle that our dispute should be referred to a Commission constituted in accordance with the Hague Convention. Nor did we find any difficulty in settling that the terms of reference to that Commission should be of a kind which we were prepared to accept. I would ask your permission to recall to your memory what the reference to that Commission is to be. I do so because I have observed that various unauthorized accounts of it have been published in the Press. The Commission will require into and report upon all the circumstances attending the disaster in the North Sea, and particularly as to where the responsibility for that disaster lies, and the degree of blame which attaches to those upon whom that responsibility is found to rest. I conceive these terms of reference will place the Commissioners in a position to deal in a thorough and searching manner with the case we have agreed to lay before it. For we are agreed, then, as to the reference to the Commission, as to the composition of that Commission, and there remains the extremely important point with regard to the criticism which has been offered, and upon which I desire to say a single word. As you are aware, a certain number of Russian officers were detained at Vigo in order to enable them to appear before the Commission of Inquiry; and it is a matter of common knowledge that surprise has been felt and expressed at the smallness of the number of officers thus detained. Now we hold strongly that it was not for us to assume any responsibility for the selection of these officers. That responsibility rests with the Russian Government, and in our belief it would be a great mistake to relieve them of it. But we have within the last day or two

Russian officers detained at Vigo in order to

received from them a distinct assurance that the officers detained were those actually implicated in this disaster, and we have received a further supplementary assurance that if it should result from the investigation of the International Commission that other officers were culpable, those other officers will be adequately punished. May I then summarize the position in which we stand at this moment? We received at once from the Russian Government a full expression of regret for the untoward incident which had taken place. We received from them, further, the promise of full and ample compensation for all those who had suffered. We also obtained from them that they would issue to their fleet instructions of a kind calculated to prevent the recurrence of such incidents and to secure neutral commerce from the risks of inconvenience. Besides that, we have obtained, as I have already told you, a reference to a satisfactory tribunal, and a distinct statement that the persons found by that Commission to be guilty shall be duly punished. . . . I will only add that no litigants ever went into court with more confidence in the justice of their cause than that which we feel when we approach this important inquiry."[1]

enable them to appear before Commission of Inquiry were those actually implicated.

Persons found guilty by Commission to be punished.

The observation of Lord Lansdowne, speaking from the point of the Government, that it is not for us to assume any selection of the officers who are implicated, and that it would be a great mistake to relieve the Russian Government of it, from the point of view of authority, is obviously consistent with common sense.

9.—The Verdict of the Coroner's Jury and the Inquiry under the Merchant Shipping Act into the North Sea Incident.

The legal proceedings first taken in this country in connection with the Baltic incident were the proceedings in the coroner's court at Hull on the death of Smith and Leggott.

The bodies of the two victims of the tragedy were brought to Hull on Sunday afternoon, October 23, in the steam trawler *Moulmein*. After having been absent for about three quarters of an hour, the coroner's jury, by a majority of twelve out of a total of nineteen jurors, returned a verdict to the effect—

[1] *Times*, November 10, 1904.

The verdict of the coroner's jury on the deaths of the two victims of the North Sea tragedy.

"That George Henry Smith and William Leggott were, about 12.30 a.m on the 22nd day of October, 1904, while fishing with trawlers out in the North Sea on the Dogger Bank, on board the British steam trawler *Crane*, in company with between forty and fifty vessels of the Hull fishing fleet, with Board of Trade marks exhibited and regulation lights burning, killed by shots fired, without warning or provocation, from certain Russian vessels at a distance of about a quarter of a mile from the said trawler *Crane;* and we further say that the bodies of the said George Henry Smith and the said Edward Leggott were landed at St. Andrew's Dock, in the parish of Sculcoats, in the city and county of Kingston-upon-Hull, on October 23."[1]

The coroner having accepted the verdict, the jury added a rider, expressing their sense of the gravity of the occasion, which faithfully reflected the great national agitation that prevailed all over the country.

Terms of the Board of Trade inquiry under the Merchant Shipping Act, 1894, ss. 465 and 728.

The terms of reference of the Board of Trade inquiry which sat at Hull were as follows:—

"The Board of Trade, under and by virtue of the powers conferred upon them by sections 465 and 728 of the Merchant Shipping Act, 1894, and all other powers thereunto enabling, are pleased to appoint Admiral Sir Cyprian Bridge, G.C.B., and Mr. Butler Aspinall, K.C., as Commissioners and Inspectors to inquire and report from time to time to them—

"(*a*) Upon the lamentable occurrences which took place in the North Sea on or about the night of October 21 and the morning of October 22, when particular vessels of the Game Cock fleet of trawlers suffered casualties and loss of life ensued;

"(*b*) Upon the quantum of the damage of whatever kind and as to compensation; and

"(*c*) Generally upon the matter."

The Merchant Shipping Act, 1894, s. 465.

The Merchant Shipping Act, 1894, Statute 57 & 58 Vict. c. 60, s. 465, runs—

"(1) Where a shipping casualty has occurred a preliminary inquiry may be held respecting the casualty by the following persons, namely—

"(*a*) Where the shipping casualty occurs on or near the coasts of the United Kingdom, by the inspecting

[1] *Times*, Thursday, November 3, 1904.

officer of the coastguard or chief officer of Customs residing at or near the place at which the casualty occurs; or,

"(*b*) Where the shipping casualty occurs elsewhere, by the inspecting officer of the coastguard or chief officer of Customs residing at or near any place at which the witnesses with respect to the casualty arrive, or are found or can be conveniently examined; or

"(*c*) In any case by any person appointed for the purpose by the Board of Trade.

"(2) For the purpose of any such inquiry the person holding the same shall have the powers of a Board of Trade inspector under this Act."

In view of the great importance of the Board of Trade inquiry at Hull, it is evident that the nature of the appointment is indicated rather under ss. 1, paragraph (*c*), than under the preceding paragraphs.

The Merchant Shipping Act, 1894, section 728, provides— S. 728, ibid. *supra.*

"The Board of Trade may, as and when they think fit, appoint any person as an inspector to report to them—

"(*a*) Upon the nature and causes of any accident or damage which any ship has sustained or caused, or is alleged to have sustained or caused; or,

"(*b*) Whether the provisions of this Act, or any regulations made under or by virtue of this Act, have been complied with; or,

"(*c*) Whether the hull and machinery of any steamship are sufficient and in good condition."

The Board of Trade inquiry into the North Sea incident sat for four days, from November 16 to 20. At the latter date, after the formal signing of the depositions had been concluded, the Commissioners adjourned *sine die.*

10.—International Incidents exhibiting Analogy to the North Sea Incident.

Before examining international incidents which seem to possess analogy to the North Sea crisis, it is desirable to state Prof. T. E. Holland on the respective.

rights of belligerents and neutrals on the high seas.

the law as regards belligerent rights and neutral rights on the high seas. A full statement was contained in a letter addressed by Professor T. E. Holland to the *Times* on Russian Prize Law, discussing the sinking of the *Knight Commander*.[1]

"It is beyond doubt that the theoretically absolute right of neutral ships, whether public or private, to pursue their ordinary routes over the high seas in time of war is limited by the right of the belligerents to fight on those seas a naval battle, the scene of which can be approached by such ships only at their proper risk and peril. In such a case the neutral has ample warning of the danger to which he would be exposed did he not alter his intended course. It would, however, be an entirely different affair if he should find himself implicated in belligerent war risks, of the existence of which it was impossible for him to be informed, while pursuing his lawful business in waters over which no nation pretends to exercise jurisdiction."

Not a case of a conflict of rights.

Sir W. Scott considered that there were no conflicting rights between nations at peace, and Duer[2] has deduced from this dictum of Lord Stowell the conclusion that the right of the belligerent to intercept contraband cannot give rise, as Vattel suggests, to a conflict of rights, and that the conveyance of contraband cannot be considered, as Historicus considered it, a neutral right. But the right of neutral ships to pursue their ordinary routes over the high seas is, Professor T. E. Holland observes, a theoretically absolute right; and the right of the belligerent to fight a naval battle on the high seas cannot be put, theoretically at least, on a higher footing. The limitation of the former right by the latter is a practical, not a theoretical, limitation, derived merely from the good sense of the neutral in avoiding war risks. But there is no more conflict of rights in this case than there is in the case of contraband. While in the case of the conveyance of contraband there is no conflict of rights because it is a case of wrong in the neutral, a neutral ship not conveying contraband, and not constituting an illegal expedition, has a right to pursue what route she pleases over the high seas. It is necessary, of course, to admit as a common-sense qualification that neutral

[1] Cf. *Times*, May 25, 1904.

[2] "Mar. Ins.," vol. i. p. 750.

ships which find themselves unexpectedly within the area of a naval battle on the high seas could not claim any indemnity for the damage they sustained. This seems to be the gravamen of the Russian case in the North Sea incident. But the belligerent who attacks neutrals, thinking they are his enemies, is responsible for the mistake, whether it occurs on land or sea. Hence the paramount question in the North Sea incident is the presence or absence of the forces of Russia's belligerent—Japan.

Practical limitation of right of neutral navigation.

In Dr. Tindal's Essay[1] there is a curious historical precedent for a lawfully commissioned fleet being treated as pirates. In 1582 Antonio, prior of Crato, a pretender to the throne of Portugal, proceeded to the Azores with a strong fleet under Philip Strozzi; but ill fortune followed him. Strozzi was defeated and killed in a battle with the Spanish admiral, Don Alvaro de Bacam, and Don Antonio fled to England. Conestagius says it was the royal navy of France, *Regiis sub Auspiciis*, with which the Spanish fleet engaged, and he had the good fortune, after a long and bloody fight, to rout it, and took above five hundred prisoners, of which almost the fifth part were persons of quality. The Spanish admiral was resolved to deal with his prisoners as pirates, because the French king, without declaring war, had sent them to the assistance of Antonio. The officers of the Spanish fleet, on the other hand, represented to their admiral that the prisoners were not pirates because they had the French king's commission. It appears that the Spaniards did execute their prisoners as pirates on this occasion, and that they were the crews of lawfully commissioned ships. The occurrence, of course, is an historical rather than a legal precedent, as it happened more than half a century before the writings of Grotius. It may, however, be observed that it was quoted on an important occasion by a high authority, at a time when there was a class of lawyers in this country who made a special study of international law.[2] The following appear to be the cases found in international law books which are most relevant to

French fleet treated as pirates by Spaniards, 1582.

[1] Phillimore's "International Law," vol. i. pp. 398–406.

[2] Cf. Sir H. S. Maine's Lecture, "International Law," vol. xii. pp. 214, 215.

the inquiry and report on the North Sea incident. It is, of course, impossible to provide an exact parallel. The incident of the Dogger Bank, in the language of international law, was the case of the public armed vessels of a belligerent State unexpectedly engaging in belligerent operations against the unarmed private vessels of a neutral State on the high seas. Had the affair been premeditated, it would have been piratical.

Definition of piracy by Sir Leoline Jenkins.

Sir Leoline Jenkins[1] observed in a charge at the Admiralty Sessions at the Old Bailey, "'Tis not only piracy when a man robs without any commission at all, but 'tis piracy when a man, having a commission, despoils and robs those which his commission warrants him not to fight or meddle with; such, I mean, as are *de ligentia vel amicitia domini nostri regis*, and also *de ligentia vel amicitia* of that prince or State that hath given him his commission."

It would seem to follow that Sir Leoline Jenkins considered that a commissioned man-of-war could become a pirate. But Phillimore observes that in the same charge Sir Leoline distinguished between "a pirate who is a highwayman and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man of war that exceeds his commission."[2] Therefore, even assuming what is, of course, inconceivable, that the Russian Baltic squadron opened fire intentionally on the Hull trawlers, they could not be considered pirates on this view, because they were lawful men of war.

But there can be no doubt that had the Russian Baltic Fleet opened fire on the Hull trawlers intentionally, well knowing the character of the latter, they would have been guilty of a piratical act. In the case of the Magellan pirates (1851), Dr. Lushington observed, "I apprehend that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that, even where

Case of the Magellan pirates (1851).

[1] "Life of Sir Leoline Jenkins," vol. i. p. 94.

[2] Phillimore's "International Law," vol. i. p. 394, s. 353.

human life was at stake, our courts of common law ever thought it necessary to extend their inquiry further." In the case of the Magellan pirates, the court was not called upon to consider whether a lawful man-of-war could be a pirate, as the vessel *Eliza Cornish* was manned by mutineers and convicts. Vattel observes, "So long as vessels sail under a national commission, and within the terms of that commission, it is quite clear that they are not, and never have been, considered pirates."[1] From what follows it seems clear that Vattel is here referring to privateers, who, as Lord Nelson observed, were very irregular. Vattel concludes that unless a piratical intention could be proved against them, privateers were responsible to, and punishable by, the State alone from which their commission issued. It is, however, difficult to see how any real distinction could be drawn between a privateer provided with regular letters of marque and a lawfully commissioned man-of-war. The enemies of the one were the enemies of the other, and it is difficult to conceive any belligerent operation possible for one which was prohibited to the other.

Vattel's opinion: a commissioned vessel acting within the terms of that commission cannot be a pirate.

Privateers were responsible to, and punishable only by, State.

Therefore, according to Vattel, if piratical intention could be proved against a lawfully commissioned vessel, it became a pirate. This possibility acquires considerable interest in connection with a statement imputed to Admiral Rohzdestvensky, that he intended to fire on any vessel which approached his squadron. It cannot be said that the statement is unlikely, since the fleet which fired on the Hull trawlers also fired on a German, a Swedish, and a Danish vessel.

Vattel contains a further passage on the abuse of power exhibited by a public armed vessel against unarmed vessels belonging to an enemy. He observes—

"In the case of stratagems we should respect not only the faith due to an enemy, but also the rights of humanity, and carefully avoid doing things the introduction of which would be pernicious to mankind. Since the commencement of hostilities between France and England, an English frigate is said to have appeared off Calais and made signals of distress,

Vattel's instances perfidy by the conduct of an English frigate.

[1] "Droit des Gens," vol. iii. c. xv. s. 229.

with a view of decoying out some vessel, and actually seized a boat and some sailors who generously came to her assistance. If the fact be true, that unworthy stratagem deserves a severe punishment. It tends to damp the benevolent charity, which should be held so sacred in the eyes of mankind, and which is so laudable even between enemies. Besides, making signals of distress is asking assistance, and by that very action promising perfect security to those who give the friendly succour. Therefore the action attributed to that frigate implies an odious perfidy."[1]

Parallel between conduct of this vessel and that of the squadron of Admiral Rohzdestvensky.

But it is impossible to deny that there is much in common between the reported action of the English frigate and the action of the Russian Baltic Fleet. In both cases there is involved the same perfidy of attacking unexpectedly unarmed vessels clothed with immunity by international law. The perfidy can hardly be less in the latter case than in the former. In 1759 the laws of war were not as humane as they have subsequently become; and whatever were the claims to inviolability of the French boat that sought to succour the English frigate, they could not be so irrefragable as those of the fishing boats of a neutral State on the high seas. As such vessels cannot be suspected of conveying contraband, the doctrine of the territoriality of the merchant vessel, if it means anything at all, must operate to render the fishing boat of a neutral State on the high seas absolutely inviolable. The attack of the Russian Baltic Fleet on the Hull trawlers was clearly of a more unexpected nature than the attack of the frigate, in the hypothetical instance adduced by Vattel. It is satisfactory that the result of the inquiry at Paris on the North Sea incident has not rendered it necessary for future annotators of Vattel to add, as a note to the above passage, another instance, where not merely a single vessel, but a powerful squadron of lawfully commissioned ships, infringed without condemnation those rights of humanity which Vattel justly considers are violated by perfidy.

The case of the *Caroline*, 1837.

The case of the *Caroline* had some resemblance to the North Sea crisis. During the disturbances in Upper Canada,

[1] "Droit des Gens," l. iii. c. x. s. 178.

in the winter of 1837, a steamboat called the *Caroline*, belonging to an American owner, had been actively engaged in carrying arms and stores from the American side of the river to the Canadian rebels, and was boarded in the night-time by a party of Canadian Loyalists, while she was lying within the jurisdiction of the territory of New York, set on fire, sent down the stream, precipitated over the falls of Niagara, and dashed to pieces. An American citizen, Durfee, was killed and several others wounded. A few years afterward, McLeod, a Canadian and British subject, when on business in the United States, was arrested and put on his trial for the murder of Durfee, having been engaged in the affair of the *Caroline*. The British Government formally demanded the immediate release of McLeod because the transaction was of a public character, planned and executed by persons duly authorized by the Colonial Government to take such measures as might be necessary for protecting the lives of her Majesty's subjects. It was further contended that the *Caroline* was a piratical vessel, and that the United States had adopted so negligent an attitude of neutrality that they had even allowed her crew to carry off a cannon belonging to the United States Government from the other side of the Lawrence. Mr. Fox, the British ambassador at Washington, said—

Position of English ambassador military officers responsible only to their Government when obeying orders.

"It is well known that the destruction of the steamboat *Caroline* was a public act of persons in her Majesty's service, obeying the orders of their superior authorities. That act, therefore, according to the usages of nations, can only be the subject of discussion between the two national Governments."

Sir R. Phillimore[1] has some interesting observations which bear to some extent on the North Sea crisis. He observes—

Sir R. Phillimore's opinion: State responsible for act of its military or naval forces in all cases.

"A State would idly plead that it was ignorant of the act of its naval or military forces, or of its accredited public servant. . . . Moreover, when a State does and can plead this credible ignorance, it is bound to repair the injury or punish the individual offender, as the case may require; unless, indeed, the injured State, as in the case of a private offender

[1] "International Law," vol. iii. s. 40, p. 55.

it may sometimes lawfully do, has executed justice for itself."

Russian Government did not plead a credible ignorance of action of Admiral Rohzdestvensky.

This passage has great interest at the present time in view of the attitude taken by the Tzar's Government in regard to the action of Admiral Rohzdestvensky. The Russian Government has not pleaded "credible ignorance" of the action of its admiral. The fact that if it had so pleaded, it would have been bound to repair the injury or punish the individual offender, coupled with the fact that it has not done so, suggests that it admitted nothing. This last conclusion is a fair inference from the promotion of Admiral Rohzdestvensky, awarded a few days after the crisis had abated.

Immediate promotion of Admiral Rohzdestvensky.

Inference from McLeod's case.

The observations of Sir R. Phillimore on McLeod's case seem to show that he approved of the action of the British Government. The matter was settled by the acquittal of McLeod by a New York jury. As applied to the North Sea crisis, the only possible inference is that Great Britain could not legally have insisted on having the offenders brought to this country and put upon their trial. The result of the Jameson Raid seems equally to suggest this conclusion. The evidence at the trial only showed that the Government knew of the raid after it had actually entered the Transvaal. It is therefore reasonable to assume that they were ignorant of the preparations made for invading the Transvaal. As to the preparations, the Government of the country could plead "credible ignorance." Their subsequent action, by proceeding under the Foreign Enlistment Act, 1870, is consistent, according to the principle enunciated by Phillimore, with the plea of credible ignorance on their part. It is equally certain that the Russian Government has done nothing of the kind in reference to the Baltic Fleet incident. They have not pleaded credible ignorance of Admiral Rohzdestvensky's act. It is difficult to infer that Russia submitted to anything except to abide by the result of the reference.

Towards the end of the summer of 1804 the British

Spanish squadron, with specie from Monte Video, captured after combat by English squadron in time of peace, 1804.

Government received intelligence (which, however, was afterwards disproved by the Spanish Government) that an armament was fitting out in Ferrol, that a considerable force was already collected there, and that French troops were near at hand. Immediately on this information the British Admiralty dispatched a squadron off Cadiz to intercept and detain by force or otherwise, the four Spanish frigates known to be bound to that port with an immense quantity of specie, which they were bringing from Monte Video. On October 5 the four British frigates sighted the Spanish frigates and immediately made sail in chase, and upon the refusal of the Spanish commanding officer to allow the squadron to be detained, an action was commenced, during which one of the Spanish ships blew up and the other three were taken by the British ships. Their cargoes netted very little short of a million sterling. Many persons who concurred in the expediency doubted the right of detaining these ships, and many, again, to whom the legality of the act appeared clear, were of opinion that a more formidable force should have been sent to execute the service, in order to have justified the Spanish admiral in surrendering without an appeal to arms. On November 27 an order was made to make reprisals on English property, and on December 12 war was declared against England by Spain.[1]

Parallel between action of British fleet in 1804, and the squadron of Admiral Rohzdestvensky.

This case seems to present analogy to the North Sea outrage, because in both cases (1) the public armed vessels of a State attacked on the high seas the vessel of a State with which the former was at peace; (2) the motive of the attack was an unfounded apprehension by the attacking State of danger from a naval armament that was proved not to exist. The two cases are, however, to be differentiated in the circumstance that the British squadron in 1804 attacked public armed vessels, and the Baltic squadron attacked merely private unarmed vessels. The parallel between the two cases seems fairly close, and the inference suggested by the incident of 1804 is that, if arbitration had not made such enormous strides in the century which has succeeded, the

Former did not attack unarmed neutral merchant vessels

[1] Jas. "Nav. Hist.," vol. iii. p. 280.

North Sea crisis of to-day must have led, at no long interval, to reprisals and war.

The *Marianne Flora*, a case of mutual mistake.

Where two vessels engaged in combat under a mutual mistake in regard to each other's character, and the vessel attacked captured the other, it was held in the United States that the capture was not unlawful, being apparently required in self-defence; and that the subsequent bringing in for adjudication was not a cause for giving damages.[1] This case is to be distinguished from the North Sea crisis because, even supposing there was a mutual mistake in the latter case, the vessels attacked were private unarmed vessels. In the North Sea case the Russians were the aggressors, and cannot possibly be considered to have the excuse of self-defence.

The case of the *Virginius*, 1873.

On October 31, 1873, the Spanish corvette *Tornado*, while cruising near Aserradero, West Indies, saw a steamer of suspicious appearance, and at 2.30 began the chase. The *Tornado* attained thirteen to fourteen knots, and steadily gained on the flying steamer. Night came, but the moon shone brightly, so that both vessels were distinctly visible. The chase continued until 10 p.m., when the *Tornado* had got within cannon shot. A gun was then fired as a summons to surrender, but no notice was taken of it. Three or four shots followed, and the capture was effected. It was near the Jamaica coast, but not in territorial waters, the commander of the *Tornado* stating the distance at twenty miles. There was no resistance, and all hands were made prisoners and taken on board the *Tornado*. The vessel proved to be the *Virginius*, a vessel built in Connecticut, and registered at New York. She bore the American flag, and was laden with military stores and reinforcements for the insurgents in Cuba, then led by General Nerano. Her commander, Captain Fry, had been an officer in the Confederate navy, and a blockade runner during the war. The *Tornado*, with her prize in tow, reached Santiago de Cuba on November 1. The master, crew, and passengers were declared pirates. Court-martials were instituted, and fifty-seven persons, including nineteen British subjects, were sentenced to death

Capture on the high seas by public armed vessel of a vessel which was an illegal expedition aiding insurgents.

Execution of English subjects as pirates by Spain.

[1] The *Marianne Flora*, 11 Wheaton, 1.

and executed. On November 4 the four chiefs, Bernabe Verona, Pedro Cespedes, Jesus del Sol, and Washington O'Ryan (the latter claiming to be a Canadian) were executed. At 4 p.m. on November 7 thirty-seven men were marched out of the prison down to the slaughter-house, and there shot. Among these were sixteen British subjects. The Ambassador of Great Britain at Madrid, Mr. Layard, told Señor Carvajal, the Spanish Minister for Foreign Affairs, that the Government of every country would bring "the authors of this shameful butchery to justice." On November 8 twelve more men were executed. An additional circumstance of brutality was that the execution took place at a spot within three hundred yards of the station of the war-vessels in which the survivors were confined.[1]

Act of Spain described by British ambassador as "a shameful butchery."

Some of the crew of the *Virginius* were Cubans, others were American or British subjects, many of whom had taken service with the *Virginius* merely for wages' sake, and without any thought of political conspiracy. This fact was established by affidavit, and was strongly brought to the notice of the Spanish authorities by Earl Granville. The news of the executions was received with horror and indignation in the United States. General Tickles, the minister of the United States at Madrid, was instructed to make instant demand for the arrest and punishment of the perpetrators of the executions, for the indemnification of the friends of the victims, and for an apology to the insult to the United States flag. Orders were given to place the navy on a war footing, in case these demands should be refused, and Congress should see fit to declare war, a decision which, with commendable prudence, the President resolved to defer to the meeting of that body. Señor Castelar, in the difficulties which surrounded his position at the head of the Spanish Government, had no choice but to comply, and orders were sent to

[1] In the "Annual Register," 1873, p. 253, the number of executions is greatly underestimated. In all, fifty-seven persons were executed (Cf. Parliamentary Papers, 1874, vol. lxxvi., and 1875, vol. lxxxiii.). Mr. W. E. Hall ("International Law," p. 267), on the other hand, rather exaggerates the disaster when he says that "the greater part" of those on board the *Virginius* were shot by order of the officer commanding the place. There were 108 passengers, and a crew of forty-six. The number of executions was fifty-seven. Parliamentary Papers, 1874, c. 991, p. 9.

Havannah for the surrender to the American Government of the *Virginius* and all the surviving passengers and crew. But then fresh difficulties arose. The Havannah authorities blustered, and threatened to refuse. Finally, however, they succumbed, the captain, General Jovellar, announcing that the orders of the Madrid Government were final, and that disobedience would produce war, in which Cuba would not have the assistance of Spain. On December 12 the *Virginius* was towed out of Havannah Harbour, and then delivered to an American steamer sent to receive her. Then came a new phase in this curious controversy. The United States lawyers, to whom the investigation of the case was committed, decided that the vessel had carried the flag illegally at the time of her capture. It followed that the salute of the United States flag by Spain would no longer be required, and that as soon as the *Virginius* should arrive at New York, proceedings would be instituted against the ship and the survivors of the crew for the fraud practised on the United States. On December 30 it was stated that, after interrogation by the authorities, the survivors had been released. The *Virginius* foundered in a gale off Cape Fear, December 26.

In the case of the *Virginius*, the British authorities adopted a very energetic attitude, and compensation was ultimately paid about two years afterwards. The acting vice-consul attributed the cessation of the executions to the moral effect of the protest of H.M.S. *Niobe* and Commodore (now Admiral) De Horsey. Acting Consul-General Crawford entered "a most solemn protest," and informed the Havannah authorities that the British Government would hold the Government of Spain, and all persons concerned, responsible for the execution of British subjects. Mr. Layard told Lord Granville that Señor Castelar assured him in the most positive terms that he agreed with him, that he was determined that the persons responsible for the wholesale execution of the crew and passengers of the *Virginius* should be punished. It is not possible to ascertain this last fact from the Parliamentary Papers, though it may fairly be presumed, after Mr. Layard's distinct expressions in

Señor Castelar promised to punish those responsible for executions of British subjects.

his letter to Lord Granville, that punishment was, in fact, meted out to those responsible.

According to Halleck,[1] in cases of prize, it is only the actual wrong-doer who is responsible when there has been no capture and no conversion to the use of the fleet or squadron. The captain must be looked to as the actual wrong-doer, and the admiral if he has given express orders, in the United States, even if he has only given permissive orders. But as the decisions of prize courts proceed according to international law, the above statement of Halleck has some relevance to the action of the Baltic Fleet. There is an analogy between the action of captors who are guilty of wilful misconduct or vexation in searching or arresting a vessel, such misconduct being unattended with any conversion to the use of the fleet or squadron, and the action of the Russian Baltic squadron in firing on the Hull trawlers. The action of the Baltic squadron is not entirely distinguishable from that of captors who, whether by design, negligence, or even honest mistake, fire the warning gun so as to cause loss of life or damage on the neutral vessel sought to be intercepted. But even honest mistake, though occasioned by an act of government, will not relieve the captors from liability to compensate a neutral for damages which the captors by their conduct have caused a neutral to sustain.[2] It would appear by an *à fortiori* train of reasoning that, whether the Russian vessels fired on the Hull trawlers by design or honest mistake, they are liable to compensate the fishermen for damages. Whether Admiral Rohzdestvensky be responsible or not, according to the principles enunciated in Halleck, appears to be a question of Russian naval law. But if he is not, then on the law of nations the captains of the vessels whence the shots were fired are in the last resort responsible. This conclusion seems *à fortiori*, since it is impossible that the admiral or commander of public ships of a belligerent incurs less responsibility for trespasses against

Liability of belligerent captors in cases of contraband for wilful misconduct or vexation.

[1] "International Law," vol. ii. pp. 388, 389.

[2] Cf. Halleck's "International Law," vol. ii. p. 388, and note referring to the judgment of the Privy Council in *Shacht* v. *Otter*, 9 Moore, Privy Council Cas., 150.

a neutral ship without any lawful pretext of interference than when the trespass is committed in the course of seizing a vessel for conveying contraband. It is not necessary to dwell on the aspect of the case if the action were intentional. The act then would be a piratical act, because robbery and murder on the high seas are piratical acts. The Russian defence in law seems to be mistaken, and as captors are liable in costs and damages for loss sustained by the neutral in certain cases, even though such loss was incurred through the honest mistake occasioned by an act of government, there cannot be any doubt as to the responsibility of the Russian Baltic Fleet for firing on the Hull trawlers.

In the case of the *Leucade* (1855)[1] Dr. Stephen Lushington observed that there were upon the records and in our books some fourteen to eighteen cases where Lord Stowell had condemned captors in costs and damages for wilful misconduct or vexation. Such cases, he observed, were totally different from cases where, upon the production of the depositions and ship's papers alone, no probable cause was disclosed for seizure. Cases of the former kind tend to show the serious liability incurred by Russia, intensified by the circumstance that there was no pretext or probable cause for seizure in the case of the action of Admiral Rohzdestvensky's ships.

Liability of Admiral Rohzdestvensky must be more certain than that of captor who abuses the right of search.

In the case of the Jameson Raid the British Government refused to allow an international tribunal to instruct this country how to perform neutral obligations. On the contrary, Lord Salisbury's Government instituted proceedings by municipal law on its own volition to punish the British subjects who had committed an infraction of neutrality. The Spanish Government, in the case of the *Virginius*, averred in its defence that the *Virginius* was a pirate. This defence was raised in a rambling and confused letter by Brigadier-General Burriell, the commander at Santiago da Cuba, where the murders occurred, who was clearly the responsible person.

In the Jameson Raid British Government punished British subjects for engaging in illegal expedition.

But Earl Granville wrote to Mr. Layards: "There was no pretence for treating such an expedition as piracy *jure*

The *Virginius* an illegal expedition, not a pirate.

[1] 2 Spinks, 228, 234.

gentium.[1] Mr. W. E. Hall also take the view that the *Virginius* was not a pirate, and observes that she had committed no act of piracy, and was unfitted both for offence and defence by the character of her equipment.[2]

Mr. W. E. Hall's opinion, that the *Virginius* could have been seized on the high seas by Spain because she was on an illegal expedition.

The same writer admits that the *Virginius* was engaged in an illegal expedition, and therefore concludes, though with evident hesitation, that her seizure on the high seas was justifiable if effected merely as a precautionary measure. Nothing but piracy or invasion could justify the execution of her crew.

The action of Admiral Rohzdestvensky's squadron an insult to the flag.

But in the case of the North Sea outrage there was both an infraction of the territoriality of the merchant vessel and an insult to the flag, and therefore it is material to recall that in the case of the *Virginius*, where both elements of wrong were wanting as far as Great Britain was concerned, compensation was demanded and obtained. Further, the amount was

[1] Parliamentary Papers, 1874, vol. lxxvi.

[2] International Law, p. 267.

There is an interesting document of the maritime jurisprudence of the seventeenth century that seems to throw some light on the question whether the *Virginus* was a pirate or not. This is a curious and rather rare pamphlet published by one of the counsel for King William in the year 1693 before the Privy Council, who desired to hear civilians upon the point of the status of privateers sailing under the commission of James II., after he had been expelled from Ireland as well as England. It appears that Jacobite lawyers of the day—Sir Thomas Pinfold and Dr. Oldys—when asked their opinion by the Lords, declared that vessels sailing under the commission of the exiled king could not be pirates, because a pirate was *hostis humani generis*. To this it was objected that it was a mere rhetorical or figurative metaphor, and that the reason of the thing proved that a pirate could not be brought under that definition. The Whig lawyers contended that such vessels must be pirates because James II. was a king without territory, and could therefore not hold prize courts. Phillimore adopts the view that these privateers were pirates *jure gentium*. But as it could not be contended in 1873 that the Cuban insurgents did not in fact exercise some dominion over districts of Cuba, they were clearly not in the position of a king without territory. Therefore, the *Virginius* could not have been a pirate. On the other hand, the *Justitia*—the vessel in question in *R.* v. *Sandoval*, (1887) 56 L. T. 526; 16 Cox, C. C. 206; a case under the Foreign Enlistment Act, 1870, where the vessel was an illegal expedition—seems very nearly to comply with the definition of a pirate as given by the Whig jurists of William III., because the revolution in Venezuela only broke out on the arrival of the *Justitia* off the coast. The *Justitia*, like the *Virginius*, had clearly no right to fly national colours. The most recent authentic case of piracy seems to be the case of the *Huascar* (Parliamentary Papers, "Peru," No. 1, 1877). There the vessel, though a man-of-war, had no commission. It seems to be a necessary conclusion that the *Virginius* was not a pirate from Mr. W. E. Hall's observation, that the affair of the *Huascar* was widely different from that of the *Virginius*.

fixed by the Earl of Derby, who assumed an attitute of great firmness on the subject towards the Spanish Government, declaring that the matter admitted of no delay. At his suggestion the Spanish Government paid a total sum of £7,700 as compensation. Three hundred pounds were paid to the family of each of the nine coloured British subjects executed. Five hundred pounds were paid to the family of each of the ten white men executed. The Spanish Government at first demurred to the rate of compensation, whereupon the British ambassador pointed out that the Spanish Government had recently paid compensation at a higher rate to the sufferers from the Carlist risings.

Compensation paid to Great Britain by Spain for the executions of crew of *Virginius*.

The fact that compensation was paid to the families of the sufferers in the case of the *Virginius* shows the irrefragable case for compensation that exists in the case of the North Sea incident. The victims of the *Virginius* affair were no doubt murdered, as the commander of a United States war vessel stated to General Burriell. Still, the expedition was illegal, and it even seems that among the British subjects on board the *Virginius* there was one who embarked with the intention of joining the insurgent forces. But the Hull fishermen were not in any sort of default, and were peaceably pursuing their legitimate avocation.

Enhanced nature of claim to compensation of Hull fishermen, because not an illegal expedition.

While it is clearly not right that Russia should escape the onerous obligations she has incurred by the action of her lawfully commissioned vessels on the high seas, it is as clearly in the interests of the civilized world that England should assert and insist upon the rights of neutrals. This is more than ever necessary at this hour. There are not wanting indications, of which the two most significant are the revival of the usage of formal declaration of war and the Geneva Award, that belligerent right is distinctly enlarging the sphere of neutral duty, which, on the other hand, was steadily on the decline for the first half of the nineteenth century.

Right of Great Britain to champion rights of neutrals.

Belligerent rights show a tendency to enlarge neutral duties.

While continental jurisprudence has always inclined to a more or less aggressive standard of neutrality, Mr. Canning, in introducing the Foreign Enlistment Act of 1819, explicitly advocated a form of neutrality so submissive as to be responsive

even to the claims of a weak belligerent like Spain. But Mr. W. E. Hall observes that it is unwise for a people to enact or retain neutrality laws more severe than it believes the measure of its duty to compel.[1] In view of the report of the Neutrality Laws Commission, it is impossible to deny that England, an unpopular litigant in the forum of nations, has in effect enacted such laws. History has shown that it is a shortsighted policy, and that a nation, by imposing sacrifices upon itself in the interests of neutrality, does not thereby win the goodwill of other countries.

Impolicy of enlarging sphere of neutral duties.

But this policy adopted by Great Britain.

While this country has adopted the largest construction of neutral obligation, continental jurisprudence has steadily aimed at minimizing the liabilities of neutrals. It may or may not be a consequence that, by the recent action of the Russian Baltic Fleet, England finds herself the victim of the most appalling blunder that has occurred on the high seas for a century, to say nothing of the series of casualties which her shipping has been encountering since the beginning of the year. It is clearly no time for deferring to the prestige of a belligerent.

Continental jurisprudence exhibits a tendency to minimize neutral duties.

Great rulers, like Cromwell of England, and Catherine the Great of Russia, have not been slow to avail themselves of indignities perpetrated on their subjects on the high seas. Cromwell acted on this principle, and made the unjust seizure by Mazarin of an English ship a ground for the demand of immediate restitution and compensation, and, in default, the issue of instant reprisals. In 1780 Catherine the Great of Russia took advantage, as has been noticed in another part of this work, of the seizure of two Russian ships by the Spaniards to form the Armed Neutrality. Historicus contended that a merchant vessel in time of war was no more like territory than Hamlet's cloud was like a weasel or a whale. This passage is, to a large extent, inconsistent with the rigorous protest met in the pages of Historicus on the *Trent* affair of 1861. It is absurd at this day to belittle the doctrine of the territoriality of the merchant vessel on the high seas even in time of war, since the great impulse given to it by the

Cromwell and Catherine II. prompt to resent depredations on mercantile marine.

[1] "International Law," 5th ed., p. 613.

Declaration of Paris. Before 1856 a belligerent could search and seize a neutral merchant vessel on the high seas either for enemy goods or for contraband. Since that event he can only do so on the latter pretext. The doctrine of the territoriality of the merchant vessel is, therefore, a growing principle, and all the tendencies of continental maritime jurisprudence are in the direction of its further assertion. History cannot record a more flagrant violation of the doctrine than that involved in the action of Admiral Rohzdestvensky's squadron. For an authoritative instance of the enunciation of the doctrine of the territoriality of the merchant vessel, one need only refer to the observations of Lord Lansdowne uttered three months before the North Sea incident. The Secretary for Foreign Affairs said, in reply to Lord Muskerry—

The doctrine of the territoriality of the merchant vessel directly involved.

"Speaking generally, a British ship on the high seas is regarded as British territory. Persons on board, whether British or foreigners, are regarded as being on British territory, and have the same protection and rights as though they were actually on British territory."[1]

Enunciation of doctrine by Lord Lansdowne, July 13, 1904.

What is known as the Waima incident of 1893 possesses a certain relevance to the North Sea crisis because it equally affords an instance of an attack on neutrals by the public armed forces of a belligerent, and, further, because it led to a convention between the attacking and injured States, creating a reference to arbitration. It also creates a precedent for the principle that compensation is due under such circumstances to the party attacked. A fight occurred on December 23, 1893, between British and French forces at Warima (or Waima), in the Conno country, owing to a deplorable mistake. The French party, consisting of thirty Senegalese sharpshooters and twelve hundred natives, under Lieutenant Maritz, attacked the British in camp, mistaking the officers in their white campaigning dress for Arabs commanding a force of Sofas. The assailants were repelled, and the French commander mortally wounded. Ten of the Senegalese were killed. The British force was made up of a hundred and twenty frontier

The Waima incident, 1893.

Compensation awarded in.

[1] *Times*, July 13, 1904.

police and about four hundred and thirty men of the West India Rifles stationed at Sierra Leone. They were on their way to punish the marauding Sofas, who had given much trouble in the British sphere of influence. The French troops were chiefly blacks, recruited in Senegal. Lieutenants Liston and Wroughton, West India Rifles, and Captain Lendy of the Constabulary were killed, with seven privates. On the British side eighteen were wounded. A fresh collision occurred in February, 1894, between British and French native police in the Samur country, on the borders of Sierra Leone. Five of the natives from British territory were killed.[1]

Convention referring Waima incident to arbitration.

On April 3, 1901, a convention was signed at Paris between the United Kingdom and France, referring to arbitration the settlement of differences between the two countries in connection with the Waima and *Sergent Malamine* incidents.[2] Baron de Lambermont, of the Belgian Foreign Office, was appointed sole arbitrator in both matters. The *Sergent Malamine* was a French vessel, seized during the *régime* of the Niger Company for what may be described as an infraction of the Customs' regulations of the company. At this date the Hague tribunal was in existence, and Baron D'Estournelles de Constant protested against the direct appointment of Baron de Lambermont as arbitrator in the Waima and *Sergent Malamine* incidents, contending that the reference to arbitration should have been made under the regulations of the Hague Tribunal.

The French, the attacking party in a case of mutual mistake, paid compensation to this country.

As regards the Waima incident, the French were willing to pay £3,830, the capital value of two annuities granted by the British Government in connection with that incident. Baron de Lambermont, as regards the Waima incident, awarded the British Government £9000. On the question of the *Sergent Malamine* his decision was favourable to the French. He delivered his award at Brussels, July 15, 1902.[3]

The grounds of Baron de Lambermont's award as regards the Waima incident are noteworthy as they may, not inconceivably, have exerted some indirect influence on the award of

[1] "Annual Register," 1893. [2] State Papers, 1901, vol. xci.
[3] State Papers, "France," No. 1, 1902.

the arbitration on the North Sea crisis. The two cases are, however, to be broadly distinguished. In the Waima incident, the principle of territoriality does not seem to have been involved, and the neutrals attacked were the public armed forces of the State. Further, to use the language of Baron de Lambermont, there was "an unfortunate concatenation of circumstances" in the Waima incident which did not specifically occur in the North Sea incident. The case was one, he observed, of an encounter between two expeditions, each operating without the knowledge of the other against a common enemy. The French troops were not alone in being surprised. The French commander, whose good faith was not contested, allowed himself to be carried away by his desire to come into touch with and disperse the bands of Sofas which threatened the security of French territory.

Parallel between the Waima incident and the North Sea incident.

The French in the Waima incident attacked armed forces whose resistance necessarily accentuated the elements of mistake and confusion. This feature was entirely absent in the North Sea crisis, where there were not the same excuses for the continuance of misapprehension by the attacking force.

The *Waima* incident of 1893 seems to constitute an exact counterpart on land to the case of the *Marianne Flora*, already alluded to. The decision of the United States court in that case is perfectly consistent in principle with the award of Baron de Lambermont. Baron de Lambermont thought that the British were justified in their resistance to the French force which attacked them; and in the case of the *Marianne Flora*, the United States court held that when two vessels engage in combat under a mutual mistake as to each other's character, the vessel attacked is even justified in capturing the other on the ground of self-defence.

The Jameson Raid, 1895–96, compared.

There are some parallels between the Jameson Raid of 1896 and the North Sea incident. If the Russian attack had been intentional, it is difficult to see how there could be any distinction, except that the neutrals attacked in the latter case were incapable of offering any resistance. The Jameson Raid was undoubtedly a case of deliberate attack on

a State by a military force which, strictly speaking, did not form part of the public armed forces of another State. The troopers of Dr. Jameson were, at the time they invaded the Transvaal, not an Imperial force, though Lord Russell of Killowen observed at the trial that all the officers at one time or another had borne her Majesty's commission. But even if the troopers of Dr. Jameson were to be regarded as an integral portion of the military forces of the Crown, the British Government pleaded a credible ignorance of their action, and punished the offenders. Both the Jameson Raid and the North Sea incident were instances of an unexpected attack. If the Russian Government had pleaded credible ignorance of Admiral Rohzdestvensky's action, and had instituted criminal proceedings against those responsible for the outrage, the two incidents of the Jameson Raid and the North Sea affair would have raised similar considerations.

The destruction of the *Maine* presents some analogy to the events of the North Sea incident.

The case of the *Maine*, blown up in Havannah Harbour, 1898.

The facts in the case of the *Maine* as detailed in the "Annual Register" for 1898 (p. 362), were that on the night of February 15, the United States battleship *Maine* was destroyed by an explosion while lying in the harbour of Havannah, and 259 of her officers and crew perished. She was not there with any hostile intent. It was naturally thought that the explosion was not accidental, but designed and executed by a treacherous foe. Without delay the United States Government ordered a Court of Inquiry, and the judgment of the American people was suspended, awaiting the result of the official investigation. The court, consisting of United States naval officers—Captains Samson and Chadwick and Lieutenants Potter and Marix—decided that the vessel was destroyed by a submarine mine, but that there was no evidence then obtainable to fix the responsibility. The Spaniards indignantly disowned responsibility for the disaster, and also held a Commission of Inquiry, which decided that the explosion came from an internal cause.

The inviolability under all circumstances of a public ship does not distinguish the two cases. Historicus admitted that

a merchant ship on the high seas in time of peace is like territory. There is, further, a great disparity in the consequences, the loss of the *Maine* being a great naval disaster. The responsibility for the catastrophe has never yet been assigned, and it is therefore unjust to attribute it to the Spanish Government. But there can be no doubt that the Russian Government is solely and directly responsible for the destruction of the *Crane* and the lives of two British fishermen. There is one feature of great gravity that is common to the explosion of the *Maine* and the North Sea incident. This is, the wide variance between the two versions of the affair in both cases, the Spanish version of the *Maine* affair differing nearly as much from the American as the account of Admiral Rohzdestvensky differed from that of the Hull fishing trawlers.

The destruction of the *Maine* led to war, and not arbitration.

It will be in general recollection that the United States and Spain did not refer the case of the *Maine* to arbitration, and that war broke out between the two countries a week after President McKinley transmitted to Congress the report of the *Maine* Inquiry Board.

The French Fishery incident, August, 1899.

An affair of altogether less moment, but which may be of some interest to recall, is the French Fishing incident of August, 1899. In that case her Majesty's torpedo gunboat *Leda* caught a Boulogne smack, *l'Etoile de Mer*, fishing in British water a mile and a half off Dungeness. The British vessel gave chase, and the French boat, while endeavouring to escape, apparently indicated an intention to return to British waters as soon as the gunboat should desist from her pursuit. Lieutenant Vernon Maud, the commander of the *Leda*, then gave orders to fire blank shots from a three-pounder, and also to fire rifle shots at the rigging, in order to stop the smack. One of the rifle shots killed a seaman named Loth on board *l'Etoile de Mer*, which was caught after an hour and a half's chase. The corpse of Loth was taken to Folkestone, where a coroner's jury returned a verdict of accidental death. Queen Victoria directed a payment of a sum of four hundred pounds, out of her privy purse, to the father of the seaman Loth. The most obvious feature in which this affair differs from the North Sea incident is that it occurred in territorial waters.

French sailor on board French smack fishing in British waters shot by rifle from British man-of-war.

Compensation paid by Queen Victoria to father of French sailor.

The principle of the territoriality of the merchant vessel on the high seas stands on an altogether different footing from the case where the vessel is in territorial waters of a foreign state. Further, the French smack was caught doing an unlawful act, fishing in territorial waters. The British fishermen in the North Sea crisis were killed while pursuing their lawful avocations on the high seas. The French Fishing incident of August, 1899, produced some angry comment from the French Press, but did not cause any international consequences. The fact that the Russian Baltic Fleet fired on deep-sea fishing boats recalls the passage in which Mr. W. E. Hall points out that the French at the beginning of the eighteenth century contended that vessels engaged in deep-sea fishing were exempt from capture, even when they belong to an enemy.[1] It is clear that Russia acts on no such rule in the present war. A Japanese fishing craft, with a crew of one hundred and seventy-two men, was attacked near the Komper river, Kamschatka. Twenty-three were killed and the remainder barely escaped to the Chishimi Islands.[2] Mr. Hall seems to consider it rather doubtful whether in future wars the fishing boats of belligerents will enjoy the immunity that they have had at certain epochs. He considers that fishing boats are sometimes of great military use, and that as States may derive advantages from their use in certain possible contingencies, they cannot reckon on enjoying immunity from capture. The order to capture French fishing boats given by the British Government in 1800 was caused by the use of some as fire vessels against the British squadron at Flushing, and of others with their crews to assist in fitting out a fleet at Brest; and it was intended that between 500 and 600 should form part of the flotilla destined for the invasion of England. It is a little difficult to understand how, under the changed conditions of naval warfare, fishing vessels could be of any military use. The instances Mr. W. E. Hall gives where fishing boats have materially aided belligerent operations are all derived from a time when belligerent operations at sea were totally different to what they are now. But even a

Parallel between French fishery incident and North Sea incident.

Deep-sea fishing boats formerly received special consideration in war.

Mr. W. E. Hall's opinion, fishing boats of a belligerent will be amenable to operations of war.

Use of fishing boats for military purposes by French, 1800.

But question as to adaptability of fishing boats for modern naval operations.

[1] "International Law," p. 452.

[2] *Times*, August 27, 1904.

hundred years ago there is no recorded instance of any enterprise being successfully effected by a fishing fleet against a naval squadron on the high seas.

Exercise by Germany of the Right of Angary in 1870.

It may be recollected that, during the Franco-German War, 1870–71, the Germans not only sank some English vessels in the Seine at Duclair, but even fired upon them while some, at least, of the members of the crews appear to have been on board.[1] The English Government acquiesced in a general sense in what had been done, and merely demanded compensation. This German action is referred to in books on International Law as an instance of the Right of Angary. Count Bismarck explained the action of the German general on the ground of necessity. Inevitable necessity, Vattel observes, often occurs in war.[2] But Count Bismarck concluded that necessity even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification. According to the explanation given in Phillimore of the Right of Angary, it is difficult, if not impossible, to see how it could be invoked to explain the action of the Germans in destroying English vessels, and even exposing their crews to imminent personal danger. Thus he quotes, as a high authority, Massé, who contends that the usage of the Right of Angary does not go to the length of destroying the neutral property adopted by the belligerent to his own ends.[3] But the fact that the English Government accepted as satisfactory Count Bismarck's justification on the grounds of necessity, is a disquieting circumstance. There does not seem a limit to the scope of this plea. It would hardly involve a more extended use of the Right of Angary to apply it in justification of the Russian Baltic Fleet than to apply it to the German action in 1870–71, in which the English Government of that day acquiesced. It does not seem a more unjust insistence on a belligerent right to sink the fishing boats of a neutral on the hypothesis that they are aiding an attack or hampering a defence, than it is to sink neutral vessels in order to

Action of Germany in 1870 not explainable on any fair construction of Right of Angary.

[1] Hall's "International Law," 5th ed., p. 738. [2] Livre iii., c. vii. s. 3.
[3] Tit. i. l. ii.; tit. i. c. ii. s. 2.

dam a river up which the other belligerent's gunboats are proceeding. The exercise of the Right of Angary involves compensation, and, strictly, pre-emption by the belligerent who avails himself of it. It is, of course, necessary to remember that neither in the domain of theory or that of usage is the Right of Angary connected with the loss of neutral subjects' lives, though, as has been seen, this might easily have resulted as a consequence of German action in 1870–71.

Right of Angary always involves compensation.

CHAPTER XV.

THE LAW OF BLOCKADE.

Introductory observations.

Mr. W. E. Hall, who is followed by Sir H. S. Maine, defines blockade as the interception by a belligerent of access to territory or to a place which is in possession of his enemy.[1] While the object of the right of a belligerent to intercept contraband *in transitu* is to cut off imports into an enemy's country, the object of the belligerent right of blockade is to cut off both imports and exports. The object of two of the greatest blockades of history, that of France by Great Britain during the Great War, and that of the Southern States of North America by the Federal Government, was partly, if not primarily, commercial. While blockades, whose object is simply to distress a population, are possibly falling into desuetude, modern experience cannot be said to confirm the view that blockade is tending to disappear as an act of war. The instances of the Spanish-American War and the Russo-Japanese War suggest a contrary conclusion. Wars are tending to become more and more naval,[2] and land sieges, accompanied by maritime blockades, to constitute decisive features in modern war. Sir H. S. Maine[3] surmised that improved means of communication would have the effect of causing blockade to fall into abeyance as an act of war. Mr. W. E. Hall and Historicus also indicated the view that there was some uncertainty about the occurrence of blockade in future wars, pointing out that blockade, as expounded

[1] "International Law," pt. iv. c. viii. p. 693; and Lectures, "International Law," p. 107.

[2] Sir H. S. Maine's Lecture, "International Law," p. 113.

[3] Lecture, "International Law," p. 115.

by continental jurists, was wholly ineffective as an act of war.[1]

But since these words were written, the experiences of Santiago da Cuba and Port Arthur have demonstrated that military blockades are not merely effective, but even decisive features of modern war. It is curious to note that a blockade of a fortified place like Gibraltar, separated from the mainland by an isthmus belonging in part to the State which possesses the fortress, would have all the effect of a blockade accompanied by a land siege.

In the view of Mr. W. E. Hall, the experience of the American Civil War proved that steam powerfully assists in the evasion of blockades.[2] But General Halleck equally considers that steam has enhanced their efficacy,[3] and it seems, on the whole, impossible to deny that the improved nature of modern communications has done much to legitimize blockade, and has also rendered it more effective in practice.

A curious experience of the blockade of Port Arthur at once impairs both the conclusions of Mr. W. E. Hall and General Halleck. It was stated in the *Times*, December 9, 1904, that for months previous to that date, hundreds of Chinese junks, propelled by ten or twenty oarsmen, found their way into Port Arthur from Chifu, Teng-chan-fu, and Tientsin with tons of fresh provisions, which they landed on the low land at the remoter side of the western harbour. The fact that the Japanese intercepted most of these junks in the first instance, and then released them, after which they ran the blockade, cannot be taken as having impaired the legal validity of the blockade. While the validity of a blockade is impaired by allowing a great number of neutral vessels to pass through in the first instance, it is not impaired by the action of the commander of a blockade who, having made a number of captures, selects a certain number of flagrant cases, and dismisses the rest on the ground of particular circumstances, such as that he cannot afford prize crews to man his captures.[4]

[1] "International Law," 5th ed., p. 704; Letters, "International Law," p. 97.
[2] "International Law," p. 704.
[3] Ibid., vol. ii. p. 188.
[4] The *Rolla* (1807), 6 C. Rob. 364, 374.

Wireless telegraphy, it may be admitted, has demonstrated itself to be a factor in impairing the validity of a blockade, while it is difficult to see how it could be of equal use to the besiegers. Owing to the Japanese protest, the installation at the Russian Consulate at Chifu was dismantled in August, 1904. It seems easy to multiply instances where a wireless telegraphy installation might be erected on neutral or belligerent territory, sufficiently near to the zone of military operations, to defeat or baffle a blockading force. The destructive nature of the floating mine, so terribly vindicated in the case of the *Hatsuse* and *Petropavlosk*, renders it, again, very difficult for a blockading force to conduct its operations, as Hautefeuille contended was obligatory, entirely within the limits of marginal seas. This reason, no less than the increased range of modern cannon, may account for the fact that the Japanese squadron blockaded Port Arthur from a distance. According to all accounts, when Admiral Vitoft sallied forth from Port Arthur in August, 1904, he only sighted Admiral Togo's squadron after several hours' steaming. No doubt he proceeded with great caution at first, owing to the danger of mines. But, according to Admiral Togo's own account, he met the Russians twenty-five miles off the Liao-tung Peninsula.[1] The Japanese blockade of Port Arthur was, none the less, completely effective from a naval point of view; and was also in no small measure effective to prevent the access of neutrals, since twenty-three vessels were captured during 1904 attempting to run the blockade.[2] It can hardly be inferred, from the experiences of the Japanese before Port Arthur, that blockades are likely to be infrequent. The growth of naval power in different countries in modern times seems to point to a contrary conclusion. In point of fact, the experience of the last decade has reproduced every feature of the law of blockade, including the controversy as to the legitimacy of a Paper blockade, which Manning, much more than half a century ago,

[1] Admiral Togo thus seems to have adopted the blockade tactics of Lord Nelson, who always insisted that the blockading squadron ought never to be seen from the blockaded port. Cf. Clarke and M'Arthur's "Life of Nelson," vol. ii. p. 363; "Ann. Reg.," 1805, 233.

[2] *Times*, January 24, 1905.

considered a sealed chapter of the maritime law of belligerency.[1] Further, the latest development of blockade, the Pacific Blockade, has definitely been growing in esteem since 1827. It would, therefore, seem that the law of Blockade demands the attention of the student of politics, history, or international law as much as at any previous period of history.

The general and safe definition of blockade.

Sir R. Phillimore considers the general and safe definition of a blockade to be that given by Sir W. Scott, who observed that the usual and regular mode of enforcing blockades is, "by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether."[2] This definition is, on the whole, complete and satisfactory. The most vexed point in the controversy between Hautefeuille and Historicus was whether the ships of the blockading squadron should be stationary or not, and in the above definition, Sir W. Scott seems to take the view of Hautefeuille. The definition, further, seems more exacting than that adopted by the Institut de Droit International, under which the ships of the blockading squadron are not required to be absolutely stationary.[3]

Incontrovertible nature of belligerent right to maintain blockade.

The existence of the belligerent right to maintain a blockade is part of the old law of nations which remains unaffected by the Declaration of Paris, 1856; and it may fairly claim to be an ultimate postulate of international law with even greater justice than the right of a belligerent to intercept contraband *in transitu* to his enemy. Sir W. Scott observed on this topic of the validity of blockade—

"There is no rule of the law of nations more established than this, that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed; it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all States know it, as it is universally acknowledged by all Governments who possess any degree of civil knowledge."[4]

[1] Cf. Letter of Professor T. E. Holland, *Times*, May 25, 1904.

[2] The *Arthur* (1814), 1 Dods. 423–425.

[3] "Ann. de l'Institut," 1883, p. 218; Règlement des Prises Maritimes.

[4] The *Columbia* (1799), 1 Rob. 154.

The controversy that has raged around the law of blockade has been confined to the mode of its maintenance, and has never extended, as in the case of contraband, to the questioning of the validity of the penalty of confiscation. Sir R. Phillimore observes—

"Among the rights of belligerents there is none more clear and incontrovertible, or more just and necessary in its application, than that which gives rise to the law of blockade."[1]

Historicus, in the note to his chapter on the Law and Practice of Blockade,[2] transcribes a long passage from Chitty's "Practical Treatise on the Law of Nations," where it is stated—

"It has been well observed that among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary as to its application, than that which gives rise to the law of blockade, as it has been ascertained, defined, and administered by the maritime tribunals of this country. The greater the research that shall be made into the principles of natural law, the more the details of the diplomatic and conventional history of Europe shall be studied, the more will it appear that this right had its origin in the purest sources of maritime jurisprudence, that it is sanctioned by the practice of the best times, and, above all, that it is so essentially connected with the vital interests of Great Britain, that the renunciation of it, under any circumstances, must be regarded as the renunciation of one of the firmest charters of our naval pre-eminence, and as the surrender of one of the surest bulwarks of our national independence."

In his first letter on blockade, Historicus observed—"Bynkershoek declares that blockade 'is founded upon the principles of natural reason as well as the usage of nations.'" In a subsequent letter he also adopts the view that blockade is one of the bulwarks of our maritime power.

Mr. W. E. Hall commends the usage of blockade from the point of view of an advocate of international peace. If belligerents are deprived of their right to injure the enemy by the action of neutrals, this would lead to belligerent complaint of neutral action, and so enlarge the area of future wars.[3]

[1] "International Law," vol. iii. s. 285, p. 382; referring to Kent's Comm. vol. i. p. 145.

[2] Letters, "International Law," p. 115.

[3] "International Law," 5th ed., p. 699. It may, however, be remembered that

The Law of Blockade and the Law of Contraband distinguished.

It may serve a useful purpose here to distinguish the operation of the law of blockade from that of contraband.

Firstly.—Questions arising from the law of contraband occur immediately on the mere outbreak of hostilities, the belligerent right to intercept contraband *in transitu* being a general incident of a state of war. But a belligerent cannot enforce the penalties of violation of blockade without notification, and the allotment of a competent blockading force actually present in the blockaded spot.

Secondly.—In the case of contraband, the noxious articles, whose carriage by the neutral involves the penalty, are of a specified class. In the case of blockade the articles which are amenable to the operation of the belligerent right comprise ordinary goods which have no relation to war, as well as those that are peculiarly subservient to it.

Thirdly.—In the case of contraband the penalty, though it may extend to the ship, falls primarily on the cargo. In the case of blockade the usual incidence of the penalty is on the ship, though it may extend to the goods, even, in one case, to the exclusion of the ship.

Fourthly.—The object of contraband is to prohibit imports of a specific kind, while that of blockade is to cut off all imports and all exports.

Fifthly.—In the case of contraband the duration of the penalty to which the neutral is amenable is limited to the outward voyage,[1] except where there are false papers, concealment, or fraud.[2]

In the case of violation of blockade, the duration of the penalty lasts as long as the blockade continues, and, therefore, may attach during the return voyage as well as the outward, unless the blockading squadron have given the vessel an implied permission to enter.[3]

Analogies between Law

On the other hand, the sphere of operation is the same

Lord Nelson was averse to the system of blockade, and even considered it impaired our naval efficiency ("Ann. Reg.," 1805, 233). The high authority of Lord Nelson, therefore, cannot be cited in support of Chitty's view; *supra*.

[1] *Per* Sir W. Scott in the *Imina* (1800), 3 Rob. 167, 168.

[2] The *Nancy* (1800), 3 Rob. 122; the *Rosalie and Betty* (1800), 2 Rob. 343.

[3] The *Christina Margaretha* (1805), 6 Rob. 62; and Halleck's "International Law," vol. ii. p. 207.

of Contraband and Law of Blockade.

either in the case of the belligerent right of intercepting contraband, or in the case of the belligerent right of seizure for violating blockade. Both rights, according to the usage of Great Britain and the United States, can be exercised on the high seas, and "on this point, the breach having been, in fact, committed, the French doctrine can be, and perhaps is, in unison with that of England."[1] There is also an analogy between the rule that only applies the penalty in the case of contraband to the ship when it belongs to the owner of the cargo, and the rule restricting the penalty of violation of blockade to the ship, except where the cargo is owned by the ship-owner or is contraband. Again, the rule exempting the ship from liability for the carriage of contraband, except where the master of the vessel knows there is contraband on board, exhibits analogy to the rule that obtains, in cases of violation of blockade, by which the cargo is exempt from confiscation, unless it can be shown that its owner was apprised of the existence of the blockade before the goods were shipped, or that there was time to countermand the shipment.

Sir R. Phillimore observes—

Authoritative writers on the Right and Law of Blockade.

"There is no subject of maritime or international law upon which the jurists of all nations are so unanimous and precise in their opinions as upon the right and law of blockade. Authorities might easily be accumulated upon this point."[2]

The author is speaking only of the authoritative writers on international law. There is, on the other hand, nothing more striking than the wide variance between the views of foreign jurists and those of Great Britain and the United States, for the last century and a quarter, on what constitutes an effective blockade and the requisite notification.[3]

Grotius upon the Right and Law of Blockade, l. iii. cap. i. s. 5, art. 3.

Grotius forbids the carrying anything to besieged or blockaded places—

"if it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port

[1] Hall's "International Law," 5th ed., p. 710.

[2] "International Law," vol. iii. s. 299.

[3] Cf. Historicus, Letters, "International Law," "England and Paper Blockade," and Hall's "International Law," 5th ed., p. 703 and note.

closely blockaded, and when a surrender or peace is already expected to take place."

If the neutral shall only have intended to inflict loss on the belligerent but shall not have actually inflicted it, the belligerent can compel the neutral to give security by retaining the thing. Further, in the case of a very unjust war, the neutral is not only civilly bound for the injury, but even criminally, like one who rescues a guilty person from a judge who is about to pronounce sentence, and it shall, therefore, be lawful to decree against him what suits his offence.

Bynkershoek, commenting on the above passage of Grotius, observes—

Bynkershoek on the Right and Law of Blockade, 2 J. P. l., i. c. iv.

"For the object, of course, of prohibiting commerce the States-General blockaded the harbours of Flanders with warships, and for this purpose, therefore, confiscated the vessels of all persons either going in or coming out thence, as by the reason of the thing and by the usage of nations it is neither lawful to bring anything to, nor to carry anything from, blockaded places. And thence the Admiralty said, as also the States-General decreed, that the law was the same in respect to vessels which had previously been captured from us and then had been sold, since, when ports are blockaded, it is even lawful to intercept the ships of friends. This is the case, if they are seized before the voyage is ended, while the captains are employed on an unlawful object; but the voyage is not considered to be accomplished, unless these vessels shall have arrived at the native port of the purchaser or a friendly port. It is certain that the States-General did not express anything less by that decree of June 26, 1630, from which circumstance you will lawfully have deduced to that issue, which I now dispute, whether in the year 1666, the States-General considered England, Scotland, and Ireland, and all those possessions which the English have in Asia, Africa, and America, blockaded by their squadrons. It has been stated that these very States-General in the year 1652 pronounced such a decree as far as the English are concerned, having equally prohibited all commerce with the English;[1] but by what right they declared it, I do not now inquire, being content to observe that these very States-General in the year 1663 refused this very right to the Spaniards, when the latter desired Portugal to be considered blockaded, which they had before claimed for themselves against the English, so it is related in the Annals."

Wheaton observes—

[1] "Aitzema," l. xxxii. pp. 774, 777.

"Bynkershoek appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting that as the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war (*oppidum obsessum portus clausos*), is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry anything to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; "but as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or not." So also, in commenting upon the decree of the States-General of June 26, 1630, declaring the ports of Flanders in a state of blockade, he states that this decree was for some time not carried into execution by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only, which consisted of contraband articles, was condemned, while the residue was released with the vessels. "It has been asked," says he, "by what law the contraband goods were condemned under these circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation."[1]

Vattel observes—

Vattel on the Law and Right of Blockade, l. iii. c. vii. s. 117.

"Hitherto we have considered the commerce of neutral nations with the territories of the enemy in general. There is a particular case in which the rights of war extend still farther. All commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to leave the place, or carry anything to the besieged without my leave; for he

[1] Wheaton's "Hist. of Law of Nations," pp. 138–143.

opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war. King Demetrius hanged up the master and pilot of a vessel carrying provisions to Athens at a time when he was on the point of reducing that city by famine. In the long and bloody war carried on by the United Provinces against Spain for the recovery of their liberties, they would not suffer the English to carry goods to Dunkirk, before which the Dutch fleet lay."

Blockade of a coast or line of ports as legitimate an operation as blockade of a single port.

Vattel, in this passage, merely contemplates the blockade of a single port, and not of a coast or littoral. Bynkershoek adduces historical instances showing that, as far as usage is concerned, a blockade may extend to a coast. It is evident, further, that, in the domain of theory, Bynkershoek considered the blockade of a coast perfectly legitimate, since he observes that a blockade is virtually relaxed—"Si segnius orae observatae fuerint."[1] The question is discussed by Reddie, who, it is curious to note, does not seem to notice the implicit sanction Bynkershoek gives to the operation.

Reddie observes—

"There does not appear to be any valid ground in law for holding that the blockade of a coast, or of a series of lines of ports situated near each other, is not an equally legitimate military operation as the blockade of a single port, provided an adequate naval force be brought to bear upon the coast. If the ports be contiguous or near each other, the force directed against each will embrace and include the intervening coast. If the ports be distant from each other, the blockade will be a useless measure, in any point of view; in fact, because neutrals are not likely either to land and deliver, or to ship and load goods on an open coast, without a harbour; in law, as not being actual, or in reality the military operation correctly designated a blockade."[2]

In the domain of usage, the two recent instances of the Spanish-American War of 1898 and the Russo-Japanese War may be cited as indicating the validity of the blockade of either a coast or of a line of ports. The United States blockaded by proclamation the whole of the north coast of Cuba, and

[1] *Juffrow Maria Schroeder*, (1800) 3 C. Rob. 147, 152.

[2] "Researches in Maritime Law," etc., cited by Historicus, Letters, "International Law," p. 114.

a portion of the south coast,[1] and the whole of the island of San Juan, and the rest of the south coast as far as Cabo Cruz on June 29. It was observed in the *Times* of that date that the great extent of the Cuban coast thus blockaded required but few ships to make the blockade effective, because the ports were few. On this latter ground, it is clear that the blockade of Cuba, instituted by the United States in 1898, must be regarded as invalid, if the views of Reddie, frequently cited by Halleck and Historicus, are accepted. It seems to have been admitted that, in fact, the blockade of the north coast of Cuba was a useless measure, as Reddie insisted a blockade carried out under similar conditions must be. The blockade originally instituted by the Japanese of Port Arthur and Dalny is of a different character. It demonstrated itself to be, as Reddie considered would necessarily be the case when ports near each other were blockaded, a blockade at once valid in law and decisive as a military operation.

Vattel on Paper Blockades, l. iii. c. 7, s. 112.

Vattel, in another passage, notices an attempt made by England and Holland to institute what Historicus appears to admit was a paper blockade of the coasts of Spain. But Historicus complained that Hautefeuille did not add that, in deference to the representations of two Northern Powers, then neutral, this blockade was abandoned. It is, however, necessary to admit that, according to the statement in Vattel, England and Holland maintained this paper blockade of the coasts of Spain for four years. While Historicus was undoubtedly correct in citing Vattel to show the abandonment by England and Holland of the blockade of 1689, it is impossible to find any justification, in the chapter of Vattel that treats of the subject, for the abandonment by England of the blockade of 1756. The sections of Vattel relied on by Hall, Halleck, or Phillimore certainly do not contain any reference to this blockade. Hautefeuille, as far as Vattel is concerned, remains unanswered on this point.

Difference between English, American,

In the rules which regulate the incidents of blockade, considerable divergence exists between the practice of England and the United States on the one hand, and that of the chief

[1] April 27, 1898.

continental Powers on the other. Fortunately, some of these differences are merely historical, such as the controversy as to whether England or France first adopted the usage of paper or cabinet blockade. Manning observes: "No jurist, no statesman will ever again defend the legality of what was at one time called the Continental System." [1] Again, in the domain of theory, Mr. W. E. Hall points out that the suggested "Règlement des Prises Maritimes," adopted by the Institut de droit International,[2] would approach very nearly to the English practice as regards the elements of effective blockade, since it does not require that the blockading ships should be absolutely stationary, and considers that to be driven off by stress of weather does not involve an interruption of the blockade. Such rules are quite in accord with the decisions of Sir W. Scott on the subject. But the differences that exist are far greater in theory than in practice. French usage in cases of egress, after notification and subsequent entrance, is, perhaps, in unison with that of England and the United States, as regards the duration of the offence and the liability to penalty. But the view of even the carefully debated Règlement des Prises Maritimes of the Institut de Droit International is that capture can only be effected during an actual attempt at violation on the blockaded spot itself.[3]

and continental view of Law and Right of Blockade.

The proposed code, therefore, imposes a limitation on the duration of the penalty for violation of blockade which is entirely at variance with theory and usage, as far as Great Britain and the United States are concerned. Yet in another respect it approximates to English and American usage, as it admits special warning to be unnecessary when diplomatic notification has been given.

The usage of France, Italy, Sweden,[4] and Spain [5] is always to require special notification to be given to the neutral by a vessel of the blockading squadron.

[1] Manning's "Commentaries on the Law of Nations," p. 333.
[2] "Ann. de l'Institut," 1883, p. 218.
[3] Ibid., 1883, p. 218.
[4] "Rev. de Droit Int.," x. 220, 441.
[5] Negrin, 213.

In the case of a *de facto* blockade, special notification is required by English and American usage, and takes the same form as the endorsement required by the French usage in all cases.[1]

Historicus on paper blockades, Letters, "International Law," pp. 89–118.

The historical controversy as to the maintenance of paper blockades formed the topic of two letters of Historicus. The controversy was provoked partly by the writings of Hautefeuille, and partly by the blockade of the Confederate ports by the United States in 1861, a blockade extending over a coast-line of more than 3000 miles. The field of operation of the Atlantic blockading squadron extended over the whole coast from the E. line of Virginia to Cape Florida. This squadron was commanded by Flag Officer Silas H. Stringham. The field of operation of the Gulf squadron, under Flag Officer William Mervine, operated from Cape Florida westward to Rio Grande. There are certainly some grounds for supposing that, in its inception, the Federal blockade was, as Hautefeuille suggested, an ineffective, if not a paper blockade.[2] It has, on the other hand, been equally recognized that the blockade became effective owing to the extraordinary efforts made by the Federals. Previous to the Civil War, it was stated on what seems credible authority[3] that the United States had only forty men-of-war in commission. But in President Johnson's message to Congress at the commencement of 1865, it was stated that the report of the secretary of the navy showed that the Federals had then in commission 530 vessels of all classes, armed with 3000 guns, and manned by 51,000 men.[4] At this date, 1865, the English navy was manned by 69,750 men at an annual expenditure of £10,392,224.[5] In an age in which the growth of naval power in time of peace is a leading feature, as the present, it may

[1] Hall's "International Law," 5th ed., p. 697, referring to *Vrouw Judith*, i. Rob. 151; the *Neptunus*, ii. Rob. 114. "Admiralty Manual of Prize Law" (Holland), 1888, p. 34. A vessel may sail with the intention of inquiring whether a blockade *de facto* is continued or not (*Naylor* v. *Taylor*, iv.; *Manning and Ryland*, 531).

[2] Cf. Wheaton's "International Law," ed. 1904, p. 692; and Sir H. S. Maine's Lectures, "International Law," p. 115.

[3] *Times*, January 3, 1863.

[4] "Ann. Reg.," 1865, p. 298.

[5] Ibid., p. 44.

not be inopportune to recall the fact that, in the throes of Civil War, the United States built up a large navy in three years. It is further material to recollect that the Federal navy demonstrated itself to be highly efficient, and that its blockade of the south materially contributed to bring the Civil War to a conclusion. But the fact that "during the American Civil War the courts of the United States strained and denaturalized the principles of English blockade law to cover doctrines of unfortunate violence"[1] seems in fact to reinforce the judgment of Hautefeuille, that the blockade of the Confederate littoral by the Federals was more a governmental than an effectual blockade. Sir W. Harcourt probably did the author of "Les Droits et les Devoirs des Nations Neutres en temps du guerre maritime" no injustice when he thus summarized the latter's argument in "Quelques questions de Droit International Maritime"—

"England has always held and practised the doctrine of paper blockade. Till the treaty of 1856, she always refused to acknowledge the principle that a blockade ought to be effective; and now, having nominally consented to admit the doctrine held by all other nations, she is seeking to evade the obligation into which she has entered, by recognizing the ineffectual blockade of the American coast, and so assisting at the creation of a precedent which may hereafter be useful to her."[2]

The English writer met this thesis by showing that England by treaty in 1801 adhered to a satisfactory definition of an effective blockade with Russia. He also cited a decision of Lord Stowell in which ships and cargoes were released by the Court because of the ineffectual nature of the blockade.[3] He further pointed out that the British Orders in Council of November, 1807, were purely retaliatory against the Berlin decree of November, 1806, and the Milan decree of the following year. Sir R. Phillimore, the great protagonist of the view of Historicus that international law does not prohibit the sale of contraband on neutral territory, thus

[1] Hall's "International Law," 5th ed., p. 709.
[2] Letters, "International Law," p. 90.
[3] The *Nancy*, Acton's Reports, p. 58.

tersely describes the situation as regards the Orders in Council and the Berlin decree—"The truth is, that France was the first wrong-doer, Great Britain the second."[1] He concluded that both the decrees and orders violated international law, and were incapable of defence on the principle of retaliation,[2] in which opinion Historicus seems to concur.[3] But at the time the Orders in Council were considered by Lord Stowell, as purely retaliatory measures, to be justly "deemed in that character reconcileable with those rules of natural justice by which the international communication of independent States is usually governed."[4]

In a second letter Historicus developed a farther position of Hautefeuille which he syllogized thus: "Blockades by cruising squadrons are ineffective blockades; England maintains the doctrine of blockade by cruising squadrons; therefore England maintains ineffective blockades."[5] Hautefeuille adopted the definition of a blockade found in the Convention of the Armed Neutrality of 1780, by which the blockading ships were required to be stationary (*arrêtés*) as well as adequate in force and sufficiently near (*suffisamment proches*). Further, the Convention required the notification *spéciale*, by which the neutral merchant ship, without any regard to the proclamation of blockade, is at liberty to sail to the blockaded port in order to ascertain for itself, on the spot, the fact of the sufficiency of the blockade, without thereby subjecting itself to any penalty. In answer to this, Historicus showed that, twenty years afterwards, Russia, by treaty with Great Britain, merely required, in order to render a blockade effective, that the vessels of the blockading squadron should be either stationary or sufficiently near the blockaded port, and dispensed entirely with the notification *spéciale*. It has been noticed that the "Règlement des Prises Maritimes of the Institut de Droit International" proposes to dispense with the notification *spéciale*, and thus is in complete accord

[1] Phillimore's "International Law," vol. iii. s. 167.
[2] "International Law," vol. iii. s. 321.
[3] Letters, "International Law," p. 94.
[4] Edward's "Admiralty Rep." (1812), 381, 382.
[5] Letters, etc., p. 99.

with English usage, and involves no less a renunciation of the views of the Second Armed Neutrality. This signal instance of coincidence between the proposals of the Institute and English theory and usages is all the more remarkable in view of the general impression that the Prize Code promulged at Turin embodied the continental as opposed to the English view of maritime law.

The merits of the controversy do not seem to lie so clearly with Historicus on the point whether, in order to render a blockade effective, the ships of the blockading squadron ought to remain absolutely stationary. Historicus refers to "the general and safe definition" of blockade given by Lord Stowell in the *Arthur*, 1 Dodson 425. It will be remembered that Lord Stowell speaks of a blockade as an arch of circumvallation formed by stationing ships, and adds if the arch falls in any one place, the blockade fails. It seems the most reasonable inference from these words of Lord Stowell that he considered that the ships maintaining a blockade should be absolutely stationary, though he allowed an exception in the case of ships being blown off by the wind.[1] The Prize Code of the Institute of International Law allows the blockading vessels to momentarily absent themselves, and also allows absence in the case of stress of weather.[2] Therefore there seems to be perfect harmony between international law as enunciated in the decisions of Lord Stowell and in the articles of the Prize Code of the Institute of International Law in this respect.

In a subsequent note Historicus developed the English case on the charge that England, and not France, initiated the paper blockades of the Great War at the commencement of the nineteenth century. Historicus showed (1) that it was idle to pretend that the blockade proclaimed by Mr. Fox of the rivers Ems, Weser, Elbe, and Trave, in April, 1806, was a fictitious or paper blockade."[3] The blockade

[1] *Frederic Molke*, (1798) 1 C. Rob. 86, 87.

[2] "Ann. de l'Institut," 1883, p. 218.

[3] Schoell, "Traités de Paix," vol. ix. p. 44; Alison's "Hist.," vol. viii. p. 122; "Parliamentary Debates," vol. x. pp. 403, 666.

was indeed retaliatory against the seizure of Hanover by Prussia, and the exclusion of all English vessels from Prussian ports. It was an act of reprisal, and seems to constitute a conspicuous instance of a pacific blockade. Schoell observes that this blockade was almost immediately limited in its operation to the towns of Hamburg and Bremen by a partial revocation.

But it was thoroughly effective as a naval operation, and on this head cannot possibly be cited as a paper blockade that provoked Napoleon to retaliate by the Berlin Decree of November, 1806. Finally, the British Order in Council proclaiming this blockade was revoked by a Circular of September, 1806. The argument, therefore, that Napoleon's Berlin Decree, promulged two months subsequently, was a retaliatory measure, seems quite untenable; (2) that the Berlin Decree, November, 1806, affords a typical instance of a paper or fictitious blockade. On this head it was stated in Parliament that—

"the French declared an imaginary blockade on the seas, and acted upon it in their condemnations on land, when they not only had not a single vessel to maintain it, and when their enemies were insulting them daily in their very harbours. Such a proceeding was as absurd as if England, without having a single soldier on the continent, was to declare Bergen-op-Zoom or Lille in a state of blockade, and act upon this order by seizing all goods belonging to citizens of these towns wherever she could find them in neutral bottoms on high seas."[1]

(3) That the British Orders of Blockade of January and November, 1807, imposing a total blockade of all ports from which the British flag was excluded, were merely retaliatory. Except in the character of retaliatory measures, it is quite impossible, Sir W. Scott admitted, to defend them.

It appears from the learned note of Wheaton's editors that there were no grounds for impeaching the validity of the Turkish blockade of the whole coasts of the Black Sea in 1878. The ground on which the effectiveness of this blockade

[1] Cf. passages quoted by Alison, vol. viii. p. 138.

was impeached was that neutrals who had violated the blockade were stopped in the Bosphorus after they had escaped the blockading squadron. This objection could only be sustained on the ground that capture cannot be effected except during an actual attempt at violation on the blockaded spot itself.[1] But the decisions of both English and American Prize Courts have established that capture for violation of blockade can be made without reference to the distance from the blockaded port.[2] The usage of England and America was followed by the Turkish Prize Courts in the case of the blockade of 1878.

Blockade of Formosa, 1884.

On October 20, 1884, Admiral Courbet proclaimed the blockade of all ports and roads of the island of Formosa[3] comprised between Cape Nan-Shah and the Bay of Soo-an. Great Britain protested, through her ambassador at Paris, alleging that the blockade was not effective.[4] It appeared that at this date the French force consisted of some thirty-four vessels, of which, however, ten were transports, manned by some five or six thousand sailors. As the French abandoned the blockade, they must themselves be supposed to have admitted that the above was an insufficient force to maintain a blockade over a coast-line of less than 200 miles. They abandoned it until the arrival of six new cruisers as reinforcements.

The two most striking irregularities of this blockade will be hereafter noticed, and seem more exceptional than its fictitious character. The proclamation of Admiral Courbet was entirely silent about specially warning neutral vessels on the spot, and actually only gave neutral vessels three days to leave the blockaded places while, for this purpose "probably fifteen days should be looked upon as a minimum period."[5] As a consequence of China's complaints of the infraction of British neutrality by French war vessels

[1] Cf. Bluntschli, s. 832; Heffter, s. 156; "Annuaire de l'Institut," 1883, p. 218.

[2] Cf. the *Columbia*, 1 C. Rob. 156; the *Nereide*, 9 Cranch (Amer.), pp. 440, 446.

[3] *London Gazette*, October 24, 1884.

[4] "Ann. Register," 1884, p. 374.

[5] Hall's "International Law," 5th ed., p. 707.

at Hong-Kong, the English Government notified that "the French blockade of Formosa must be taken by the neutral Powers as a notification of a state of war."[1]

Blockade of Hayti, 1888.

The blockade of insurgent Haytian ports, proclaimed by Hayti in November, 1888, having ceased to be effective in the July following, Lord Salisbury notified to the Haytian Government that it could no longer be respected, and that British vessels entering or leaving ports in the possession of the insurgents must not be molested by the government cruisers.

Allusion to paper blockades by Prof. T. E. Holland, *Times*, May 25, 1904.

During the Russo-Japanese War, in a letter addressed to the *Times* on laying mines in the open sea, Professor T. E. Holland observed that—

> "Strong disapproval was expressed of a design erroneously attributed to the United States a few years since of effecting the blockade of certain Cuban ports by torpedoes, instead of by a cruising squadron. These, it was pointed out, would superadd to the risk of capture and confiscation, to which a blockade runner is admittedly liable, the novel penalty of total destruction of the ship and all on board."[2]

If inventive science had progressed several decades faster, Napoleon might possibly have attempted to enforce his Berlin decree by the very operation unjustly attributed to the United States, since, Sir H. S. Maine points out, many efforts to improve the earliest form of the torpedo were made at the date of Napoleon's threatened invasions of England.[3] There are two cases when a blockade may be conducted with such a minimum of naval power as to be nearly a paper blockade, and yet may be effective by reason of physical conditions. In the case of ports or seas separated from the ocean highway by a narrow isthmus, a single vessel may be as effectual as a large squadron. Thus during the Russian War in 1854 the blockade of Riga was maintained at a distance of 120 miles from the town by a ship in the Lyser Ort, a channel three miles wide, which forms the only navigable entrance to the gulf.[4] Buenos Ayres has been effectually blockaded by vessels stationed in the neighbourhood of Monte Video; and, as has been seen, the

[1] "Ann. Register," 1884, p. 375.
[2] *Times*, May 25, 1904.
[3] Lectures, "International Law," p. 142.
[4] *Franciska*, x. Moore, 46.

Turkish blockade of 1877–8 was effected by two cruisers stationed in the Bosphorus. General Halleck, again, points out that a blockade is not necessarily made by ships; it may equally well be made by land batteries commanding the sea.[1] But when a blockade is thus made by land, it must be supported "by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter."[2] These two cases constitute an exception to the rule that a blockade is fictitious and therefore illegal, unless maintained by a competent blockading squadron. They arise solely from the physical configuration of a port or sea, and do not affect the principle.

It seems a consequence of blockade being "la plus grave atteinte qui puisse être portée par la guerre au droit des neutres,"[3] that "a declaration of blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it."[4] Lord Nelson seems to have felt in a peculiar degree the responsibility of the commander of a blockading squadron. When blockading Cadiz just before Trafalgar he anticipated, in a letter to Lord Castlereagh, that neutral States would impute to this country sordid motives in blockading Cadiz.[5]

The President of the United States, in time of war, has the power, by virtue of the constitutional authority conferred upon him as commander-in-chief of the army and navy, to institute and declare a blockade.[6] During the Spanish-American War of 1898 President McKinley issued no less than three blockade proclamations. On April 27 the President declared a blockade of the north coast of Cuba, and at the end of June the blockade of the south coast and of San Juan was proclaimed. On neither occasion was Santiago blockaded by diplomatic notification, so it was presumably a *de facto* blockade. By the English and American practice, the most important difference

[1] "International Law," vol. ii. p. 189.

[2] The *Circassian*, (1864) 2 Wall. 135, 149, *per* Chief Justice Chase.

[3] Cauchy, t. ii. p. 196; Fiore, t. ii. p. 446; and cf. the observations of Sir W Scott in the *Lisette*, (1807) 6 C. Rob. 387, 393.

[4] *Per* Sir W. Scott in the *Hendrick and Maria*, (1799) 1 C. Rob. 146, 148.

[5] Clarke and M'Arthur's "Life of Nelson," v. 2, p. 495.

[6] The *Tropic Wind*, 14 Law Rep., N.S., 144.

between a blockade proclaimed by diplomatic notification and a *de facto* blockade is that special notification on the spot is always required in the latter case.

Sovereign may proclaim blockade by naval commander

But a blockade is an act of sovereignty which can be delegated. In the case of the *Rolla*, (1807) 6 Rob. 364, 366, Sir W. Scott said—

> "A commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed. On stations in Europe, where Government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different."

It seems clear that the blockade of Port Arthur was an instance of a blockade proclaimed under delegated authority.[1] Sir R. Phillimore states that "It is the duty of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately the discontinuance of it."[2] This was done during the present war in the case of the blockade of Port Arthur. The limitation of the blockade rendered expedient by the Japanese successes just before the fall of the fortress was notified in the same way as the commencement of the blockade,[3] and the proclamation of complete discontinuance promulged in the same form appeared a few days later.[4]

A valid exercise of delegated sovereign power requires to be carefully distinguished from the case where a blockade is extended by a subordinate officer acting *ultra vires*.

A notice not to proceed to any port is illegal. A notice which is bad for all ports cannot be good for any one. Therefore in a case where a Danish vessel was taken on a voyage

[1] *London Gazette*, May 31, 1904, where it was stated that, "by command of the Imperial Japanese Government, Admiral Togo has declared that on the 26th inst. the entire coast of the Liao-tung Peninsula, lying south of a straight line drawn between Pitsewo and Pulan-tien, was effectively blockaded by the Imperial naval forces, and that the blockade will continue to be maintained in an effective state."

[2] "International Law," vol. iii. s. 390.

[3] *London Gazette*, January 6, 1905.

[4] Ibid., January 13, 1905.

from Norway to Amsterdam, it was held that notice of a general blockade of the coast of Holland, untrue in fact, was not available by limitation to a blockade of Amsterdam only, though that existed in fact. The same principle would seem to apply to the case where a subordinate officer restricts the operation of a regular notification of blockade.[1]

Blockade means effective blockade.

It is alike a conclusion from theory, treaties, unilateral acts, and the decisions of Prize Courts that, for the purposes of international law, blockade means effective blockade.

Treaties regulating subject.

By treaty of 1742 between France and Denmark it was required that a blockaded port must be closed by two vessels at least, or by a battery. By a treaty of 1753 between Holland and the Two Sicilies it was required that a blockade should be maintained by at least six ships of war ranged at a distance of gunshot from land or by shore batteries. A treaty between Denmark and Genoa required blockade to be effective. In 1794 Great Britain and the United States concluded a treaty stipulating that blockades should be effective. The Convention of the First Armed Neutrality required a blockade to be maintained by stationing vessels sufficiently near the blockaded port to produce evident danger in entering. The Convention of the Armed Neutrality of 1800 decreed—

"Que, pour determiner ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger evident d'entrer. Et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d'avoir contrevenu à la présente convention, que lorqu'aprés avoir été averti par le commandant du blocus de l'état du port, il tâchera d'y pénétrer en employant la force ou la ruse.[2]

In 1801 England concluded a treaty with Russia declaring that—

"Que, pour determiner ce qui caractérise un port bloqué, on n'accorde cette dénomination qu'à celui où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtes ou suffisamment proches, un danger évident d'entrer." [3]

[1] *Neptunus*, (1799) 2 Rob. 110. [2] Martens, "Rec.," vol. vii. p. 176.
[3] Ibid., *supra*, p. 263

Historicus observes that Sweden and Denmark subsequently, by separate conventions, adhered to the treaty as concluded by Russia, and that it was not necessary for America to accede specifically, for on that subject her courts have always held precisely the same doctrine as Great Britain. In 1818 Denmark and Prussia agreed by treaty that, in order to constitute a lawful blockade, it should be required that two vessels should be stationed before every blockaded port. It is necessary to recollect that treaties regulating the law and right of blockade, like treaties regulating the law and right of contraband, are not concluded in contemplation of either mutual alliance or mutual belligerency, but for the case where one of the contracting parties becomes a belligerent, the other remaining neutral.[1] The same principle must apply, *mutatis mutandis*, to general treaties, such as those of the Armed Neutralities or the Treaty of Paris. It must be implied in such cases that the article regulating the law and right of blockade operates only as between the contracting parties who may stand in the relation of neutral and belligerent. It may be a consequence of this that there seems little more uniformity between treaties regulating the law of blockade than those regulating contraband. The undoubted advantage Historicus gained by reminding Hautefeuille of the existence of the treaty of 1801, between Russia and England, operated even more significantly as a reminder of the inconsistency of the former Power. The advantage was much more than the sleight of a skilful controversialist, and the English writer was justified in deducing his conclusion that in 1801 Russia had virtually sanctioned blockades by cruiser squadrons. The abandonment by Russia of the neutral right to special notification was even more significant. But two or three treaties between individual Powers cannot constitute a general custom,[2] and it is perhaps difficult to follow Historicus in the wide inference he drew. The last word on the subject of the effectiveness of a blockade as declared by treaty is the fourth article of the Declaration of

[1] Phillimore, "International Law," vol. iii. s. 279.
[2] Ibid., s. 236.

Paris, 1856: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy." Sir H. S. Maine observes that "the law of contraband of war and the law of blockade are not touched by the reform under the Declaration of Paris, except so far as a principle long contended for is applied to blockades."[1] The true rule of international law might well have been declared at a general treaty, like the Declaration of Paris. But in fact the opportunity was lost, the pronouncement of the declaration on blockade being nearly as much open to the charge of indefiniteness as the treatment of contraband. In view of Sir H. S. Maine's conclusion, that the Declaration of Paris cannot be considered a permanent solution of the vexed points of maritime law, the attitude of Japan towards the declaration is invested with great interest. The future of the declaration would be very uncertain if another powerful maritime State, like Japan, were to join the ranks of the dissentients, which have already included the United States. On this topic it is fortunately possible to appeal to a very recent and authoritative pronouncement. The issue was directly raised in a correspondence in the *Times*, and Professor T. E. Holland observed that "the action of the Japanese is in full accordance with the letter and spirit of all four articles of the Declaration of Paris."[2] Baron Suyematsu afterwards rendered an express and authoritative support to the accuracy of this statement.[3] In the early months of the Russo-Japanese War it was stated that all appeals for the restitution of neutral cargoes on board captured Russian steamers had been dismissed by the Sasebo Prize Court.[4] This may have been one of the circumstances inducing the conclusion that Japan has not joined the ranks of the signatories of the Declaration of Paris. But even as stated, this inference was not entirely justified, because the cargoes may have been contraband of war; and it is clear that it must be dismissed in view of the letters of Professor T. E. Holland and

[1] Lect., "International Law," p. 105.
[2] *Times*, March 14, 1905.
[3] Ibid., March 16, 1905.
[4] Ibid., May 27, 1904

Baron Suyematsu. The indefiniteness of the Declaration of Paris cannot be remedied even by the addition of powerful maritime States to its list of signatories. As far as the usage of blockade is concerned, nothing that has happened during the Russo-Japanese War could justify the conclusion that Japan does not admit the necessity of the effectiveness of a blockade, which is the sole postulate of the Declaration of Paris on the subject.

Unilateral act requiring a blockade to be effective.

At the commencement of the Crimean War in 1854 England and France declared their intention "to maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's ports, harbours, or coasts."

General Halleck observes that this declaration was a virtual condemnation of paper blockades, although it was in form a mere temporary order.

Decisions on subject of effectiveness of a blockade.

The facts in the case of the *Mercurius*, (1798) 1 C. Rob. 80, 82, were that a German vessel was seized at Yarmouth for an attempt to violate the blockade of Amsterdam, after having been notified of the blockade by a king's ship in the Texel. She had previously been seized, and, after having been restored, was arrested again at Yarmouth.

In this case Sir W. Scott observed it is necessary to inquire, in order to ascertain liability for an alleged breach of blockade, "Was there an actual blockade? Was it notified? Was it violated? If all these points can be established, confiscation must necessarily follow." On the question of effectiveness, Sir W. Scott observed—[1]

"It is said that this passage[2] to the Zuyder Zee was not in a state of blockade. But the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The Powers who formed the armed neutrality in the last war understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade when it is dangerous to enter into it."

In the case of the *Betsey*, (1798) 1 Rob. 92A, 93, Sir W. Scott

[1] *Times*, *supra*, p. 84.

[2] The Vlie passage.

observed that the evidence of a blockade should be clear and decisive; and the affidavit of a captor was considered inadequate in that case. A port may be said to be completely invested when a number of vessels are stationed round the entrance so as to cut off all communication. But to issue a proclamation declaring territories like Martinique, St. Lucie, and Guadaloupe to be put into a state of blockade at the same time is to entertain "a very loose notion of the true nature of a blockade." The Lords of Appeal had determined that the proclamation of a commander-in-chief, without actual investment, is not in itself sufficient to constitute a legal blockade. A blockade is not rendered effective because there is a danger of meeting cruisers in the region; and a port which is declared in "a state of siege" is not necessarily blockaded.[1] This last conclusion of Sir W. Scott is capable of illustration in the Russo-Japanese War. It was announced on February 13, 1905, that the fortress of Vladivostock was declared to be in "a state of siege," and that the acting commander was invested with all the powers of commander-in-chief as regards the civil population. In the *Betsey*, (1798) 1 C. Rob. 92A, 94, Sir W. Scott observed, with reference to the statement of the master in that case, that the expression "'state of siege' is a term of the new jargon of France, which is sometimes applied to domestic disturbances."

While Vladivostock has been placed in a state of siege it does not seem to have been blockaded. There has certainly not been any notification of the blockade to neutral Powers. In view of the command of the sea maintained by the Japanese, and the fact that Japanese cruisers were patrolling the Tsushima and Tsugaru Straits, the maritime approaches to Vladivostock, a question may arise whether there is not a *de facto* blockade. But by the existing prize law of Japan, March 7, 1904, naval commanders are instructed to notify the fact of blockade as far as possible to the competent authorities and the consuls of the neutral Powers within the circumference of the blockade.[2] It seems that this has not been done,

[1] The *Betsey*, (1798) 1 C. Rob. 94.

[2] It was noticed in the case of the Hoffnung, (1805) 6 C. Rob. 112, that Lord

and it must be concluded that Vladivostock is not blockaded,[1] though the point cannot be established.

In the case of the *Circassian*, (1864) 2 Wall. 135, 149, Chief Justice Chase observed—

"The object of blockade is to destroy the commerce of the enemy, and cripple his resources by arresting the import of supplies and the export of products. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter."

This case decided that the occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing, the city itself being hostile, the opposing enemy in the neighbourhood and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade. The facts in the case arose out of the siege and blockade of New Orleans. The city of New Orleans, and the forts commanding its approaches from the gulf, were captured during the last days of April, 1862, and military possession of the city was taken on May 1. On May 4 the British steamer *Circassian* was captured by the United States for an attempted violation of blockade, and was condemned. The principle of this decision has apparently determined some incidents of the Russo-Japanese War. Though Port Arthur was formally entered by the Japanese on January 8, 1905, the Japanese administration only declared the Liau river open on March 28, though it was stated that a large fleet of merchantmen had accumulated at Dalny, Taku, and Chifu. But it seems clear that the reason for delay was the danger of floating mines.

Collingwood, when he blockaded Cadiz de Novo on June 8, 1805, after Sir John Ord had been driven off on April 10 by a superior force, addressed a letter to the foreign consuls at Cadiz, notifying them of the practical, though not legal, resumption of the blockade.

[1] *Times*, March 10, 1905.

In the *Baigorry*, (1864) 2 Wallace 474, it was held that the fact that the master and mate saw no blockading ships off the port where their vessel was loaded, and from which she sailed, is not enough to show that a blockade, once established and notified, has been discontinued. In this case Chief Justice Chase considered that the fact that neither master nor mate saw any vessels when they entered Calcasieu Pass was counterbalanced by an admission of the master that he had seen blockading ships when going towards the coast of Louisiana four months previously.[1] This inference would go far to vindicate the contention of Hautefeuille, that the federal blockade of the Southern States was in principle a paper blockade. Such a dictum is not consistent with the decisions of Lord Stowell.

In the case of the *Hendrick and Maria*, (1799) 1 C. Rob. 146, where a Danish vessel was captured for attempting to violate the blockade of Amsterdam, and the only other vessels in sight at the time were two Danish merchantmen, Sir W. Scott construed the facts in favour of the claimant, saying, "The sight of one vessel would not certainly be sufficient notice of a blockade, and therefore it is necessary that it should be signified to me that there was a blockade *de facto*."[2] It, however, appears from another case that Sir W. Scott thought that two vessels were proof of a blockade *de facto*, when there were other blockading vessels operating nearer the port, "for surely it is not necessary that the whole blockading force should lie in the same tier."[3] It is quite sufficient when there are only two in the exterior line. In the case of the blockade of the port of Trinity, Martinique, the court held that one vessel was competent to maintain the blockade of one port and co-operate with other vessels at the same time in the blockade of another neighbouring port. The reason assigned was, that the question of the competency of the force was solely for the commander of the station, and as he considered the force adequate, there was nothing left to discuss.[4]

[1] *Times, supra*, 480.
[2] Ibid., 147.
[3] The *Neptunus*, (1799) 1 C. Rob. 170, 172.
[4] The *Nancy*, (1809) 1 Acton, 63, 64.

It is, perhaps, to be observed that this was not a decision of Lord Stowell's, and it certainly seems inconsistent with his dictum that mere liability to meet a cruiser does not constitute a blockade.[1] However, in the case of the *Nancy* the court held that "the periodical appearance of a vessel of war in the offing could not be supposed a continuation of blockade."[2] According to the decision of the court of the United States in the case of the *Baigorry*, (1864) 2 Wall. 474, the fact that the neutral master, while in the blockaded port, saw steamships at intervals, was considered sufficient indication to him that the port was blockaded.

In the case of the *Andromeda*, (1864) 2 Wall. 481, it was considered, though the fact did not constitute the basis of the decision, that a blockade was not ineffective, though continual entries in the log-book of the captured vessel showed that in clear weather no blockading vessels were to be seen off the port.

The least that can be said is that these decisions, arising out of the events of the American Civil War, tend to impair the harmony which Sir R. Phillimore, writing in 1857, declared to exist upon every point of blockade, between the decisions of the prize courts of this country and those of the United States.[3]

In *Geipel* v. *Smith*, (1872) L. R. 7 Q. B. 404, it was held that a blockade is "a restraint of princes," and that, therefore, a shipowner is justified in throwing up a contract when the further performance of the contract within a reasonable time is prevented by blockade. In this case, on the subject of the effectiveness of a blockade, Cockburn, C.J., observed—

> "In the eye of the law a blockade is effective if the ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through."[4]

Mr. W. E. Hall observes that a large number of successful evasions may be insufficient to destroy the legal efficiency of

[1] *Betsey*, (1798) 1 C. Rob. 92A, 94.
[2] Ibid., *supra*, p. 59.
[3] Cf. Phillimore, "International Law," vol. iii. p. 387; and Hall's "International Law," 5th ed., pp. 694, 698, 709.
[4] Ibid., *supra*, p. 410.

a blockade.[1] A blockade is taken off where, from motives of civility or other reasons, ships not privileged to enter or come out are allowed to do so by the commander of the blockading squadron.[2] The reason is that blockade is a uniform universal exclusion of all vessels not privileged by law; and, therefore, if some are permitted to pass, others will have a right to infer that the blockade is raised. The object of blockade being to interdict the maritime access of all neutral commerce to the blockaded port, vessels "not privileged to enter or come out" are "neutral merchant vessels," and not the public vessels of neutral States,[3] or vessels despatched by minister of neutral State resident in the country to which the blockaded port belongs for the purpose of carrying home distressed mariners of the minister's country.[4]

Opinion of continental writers as to what constitutes the effectiveness of a blockade.

The following is a brief summary of the views of modern continental jurists on the subject of the effectiveness of a blockade. Mr. W. E. Hall, while admitting that their views are supported by treaty previous to the Declaration of Paris, considers that they not only conflict with the Declaration, but also with authoritative usage.[5]

First. The immediate entrance to a port must be guarded by stationary vessels.[6]

Second. The immediate entrance must be guarded so as to expose any ships running in to a cross-fire.[7]

Third. Any accidental circumstance which makes it temporarily possible to go in puts an end to the blockade, and justifies a vessel attempting to enter.[8]

Mr. W. E. Hall must be considered as referring exclusively to English and American usage when he says[9] that the value of the above views of modern continental jurists are inconsistent with authoritative usage. The French Naval

[1] "International Law," 701.
[2] The *Rolla*, (1807) 6 Rob. 364, 372.
[3] Hall's "International Law," 5th ed., p. 711.
[4] The *Rose in Bloom*, (1815) 1 Dods., p. 58.
[5] "International Law," p. 703.
[6] Heffter, s. 155; Ortolan, ii. 328; Calvo, s. 2567; Gessner, s. 179.
[7] Hautefeuille, t. ix. c. ii. s. 1.
[8] Ortolan, ii. 344; Hautefeuille, t. ix. c. ii. s. 1, art. 1.
[9] Ibid., *supra*, 703.

Instructions of 1870, issued when Admiral Bouet Willaumez blockaded the German ports in the North Sea and Baltic, provided that, in the very terms employed by Ortolan and Hautefeuille, "a blockade is raised by any interruption whatever." It was, however, additionally provided that it would be considered to constitute a breach of blockade for a neutral to take advantage of the absence of the blockading squadron, unless she had previously ascertained its absence elsewhere.[1]

Necessity of the notification of a blockade.

The principle of the effectiveness of a blockade not being in controversy since the Declaration of Paris, 1856, art. 4, it is necessary to assume that, for purposes of international law, a blockade means an "effective blockade." But as blockade is a high act of sovereignty inflicting a universal obligation on neutral commerce, it is right that the subjects of neutrals should be notified, either diplomatically or individually, of its institution. This principle is as well established as the requisition of effectiveness, though the Declaration of Paris is silent on this head. Broadly speaking, there exists no controversy as to the necessity of notification either in theory or usage. But great variance exists, and has existed, since the Convention of the Second Armed Neutrality as to the form which the notification of blockade should take. While the English and American usage is always to give either diplomatic or special notification, and sometimes both,[2] the rule

[1] NOTE.—The entirely indecisive nature of the French blockade in 1870, especially when it is remembered that it was conducted in great force, seems the most apt historical instance of the conclusion of Sir H. S. Maine, that blockades of a European littoral, such as that maintained by this country during the great war, have become of no value owing to the railway system. The squadron of Admiral Bouet Willaumez consisted of fifteen ironclad ships and twelve other vessels. But the belligerent expediency of its operations was from the first recognized to depend entirely on the success of the French armies ("Ann. Reg.," 1870, p. 159); and owing to the early defeats of the French army, the fleet was withdrawn in October without having effected anything of moment. It is obvious, from the point of view of interception of neutral commerce, that the railway must have been as decisive a factor in defeating the actual blockade of the German ports in 1870 as it would be in the case hypothetically adduced by Sir H. S. Maine—the blockade of the coast of France. But, as has been pointed out, the signal experiences of 1898 and 1904 seem, no less conclusively, to accentuate the value of blockade in recent times, when it is accompanied by a siege.

[2] Cf. the blockade proclamation of President McKinley, April 27, 1898, declaring a blockade of the north coast of Cuba, in *Times*.

of the usage enforced by France, Italy, Sweden,[1] and Spain,[2] is that the neutral is only amenable to the penalties of violation of blockade when he attempts to enter the blockaded port after having received special notification on the spot. Among the authoritative writers Grotius[3] impliedly insists on the necessity of notification since he imposes the knowledge of the neutral as a condition of the exercise of the belligerent subject. Bynkershoek and Vattel are silent on the subject of notification as an indispensable condition of the belligerent right. Both, indeed, allude to belligerent decrees or proclamations of blockade, but only do so to criticize their obligatory force on neutral States, when they are not enforced by the presence of a competent blockading squadron.

By English and American usage, blockades admit of division according to the evidence furnished by blockading State.

According, therefore, to the English and American usage, blockades are susceptible of a division into two classes, according to the nature of the notification by which the neutral master is affected with the knowledge of the blockade, rendering him amenable to the penalties of the law of nations for its violation.

In order that a blockade may be valid it must be either (*a*) a public or governmental blockade diplomatically notified, or (*b*) a *de facto* blockade accompanied by notification on the spot given by a vessel of the blockading squadron.

According to the opposed foreign usage, though not according to the theory of foreign jurists, there is no such thing as a diplomatically notified blockade, and therefore the only valid form of blockade is the *de facto* blockade, with the "notification *spéciale*" dating from the Second Armed Neutrality, 1800.[4]

Special warning was, before 1800, always required by the Prize Tribunals of this country in the case of *de facto* blockades, but is confined to this instance,[5] except in the case where evidence is unnecessary because of the notoriety of the blockade. Ortolan (ii. 335–341) and Calvo (s. 2581) consider that special notification is essential. But Pistoye and

Modern foreign jurists on what constitutes necessary evidence of a blockade.

[1] Bulmerincq, "Rev. de Droit Int.," x. 220, 441.
[2] Negrin, 213.
[3] *loc. cit.*, *ante*.
[4] De Martens, "Rec.," vii. 172.
[5] The *Mercurius*, (1798) 1 C. Rob. 80, 83.

Duverdy (i. 370) and Hautefeuille (t. ix. c. ii. s. ii.) consider that both diplomatic and special notification ought to be given. It is of some interest to recall Lord Stowell's remark, that the purpose of notification was "better obtained" by personally informing the neutral master than by public notification.[1] But this cannot be construed as an admission by Lord Stowell that public notifications of blockade were inadequate. On the contrary, Lord Stowell, on another occasion, observed that it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of public notifications of blockade.[2]

The view of jurists laid down by the Institute of International Law seems to imply the necessity of a diplomatic notification, which "must not only define the limits in latitude and longitude, and the precise moments of its commencement, but also state the time granted to merchant vessels for unloading, relading, and leaving the port.[3]

The commander of the blockade must, moreover, give notice of it to the authorities and consuls at the blockaded place. The same formalities are necessary after the re-establishment of a blockade which may have ceased to be effective, or when the blockade is extended to new places.[4]

General Halleck on diplomatic or public notification of a blockade.

The subject of diplomatic notification is treated with great care by General Halleck.[5] In form, it is an official communication from the belligerent to the authorities of neutral states. In substance, it is a notice that (1) a certain port will be blockaded on and after a certain date; or that (2) it is the intention of the belligerent to proceed to blockade certain ports or harbours.

A subsequent notice of the actual commencement of the blockade is given as matter of courtesy. In the case of the Spanish-American War of 1898, the diplomatic notification given was of the actual commencement of the blockade. But the proclamation, as has been already observed, provided that

[1] The *Mercurius*, (1798) 1 C. Rob. 80, 83.
[2] *Neptunus*, (1799) 2 C. Rob. 110, 112.
[3] "Règlement des Prises," 1882, 1883, and 1887, arts. 7 and 36.
[4] Art. 37.
[5] "International Law," vol. ii. c. xxv. pp. 182–213.

special notification should be given. This appears to be the American usage; the Federal proclamation of April 9, 1861, also provided that vessels would be individually warned, but it seems that this was only conceded in the case of vessels coming from a distance. General Halleck specifically states that, under this proclamation of 1861, special notification was not necessary when, at the time of capture, the neutral knew of the blockade.[1]

The distinction between a public or governmental and a *de facto* blockade is based on evidence. In the former case the *onus probandi* of proving that the blockade does not exist lies on the claimant, a notified blockade being presumed to exist till the notification is revoked. In the case of a *de facto* blockade there is no presumption as to continuance, and the captor must prove that it existed at the date of the seizure.

A notified blockade is regarded as valid by the English or American view, because notice to the neutral Government is regarded as constructive notice to all its subjects.[2] In a case arising out of the blockade of Havre in 1798, Sir W. Scott observed—

"The notification of the blockade of that port was made on February 23, 1798, and this transaction happened in November of that year; the effect of a notification to any foreign Government would clearly be to include all the inhabitants of that nation (it was the case of a Prussian ship); it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own Government, and may raise a claim of compensation from them; but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is

[1] *Hiawatha*, Blatchford, P. C. 1; *Circassian*, ii. Wall. 151; *Nereide*, ix. Cranch, 440.

[2] Kent, "Comm. on Am. Law," vol. vi. pp. 147, 148; Phillimore, "International Law," vol. iii. s. 290; Duer on "Ins.," vol. i. p. 659; *Jonge Petronella*, 2 Rob. 131; *Spes and Irene*, 5 Rob. 79; the *Welvaart*, 2 Rob. 128.

the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only is, that in the former the act of sailing to a blockaded place is sufficient to constitute the offence."[1]

Blockade *de facto*, and notification on the spot by vessel of blockading squadron.

The requisition of the notification *spéciale* by the Second Armed Neutrality and by France suggests that there was substantial agreement between English and continental usage in the case of *de facto* blockade, but that such agreement is confined to this form of blockade. On the other hand, Admiral Courbet's proclamation of the blockade of Formosa in 1884 seems to show no less clearly that French usage no longer requires the notification *spéciale*. This would finally remove the difference between the usage of France and England. Both Powers would then consider notification to the neutral States as constructively notification to each of its subjects; while, of course, special warning would continue to be given in the case of a *de facto* blockade, according to the usage of both countries.

If a neutral vessel is specially warned by a vessel of the blockading squadron, a blockade *de facto* is proved to exist. Immediate arrest is proof of sufficient force to blockade.[2] A blockade *de facto* differs from a public or governmental blockade: (*a*) in the scope of the radius within which the belligerent may exercise his right of arrest for breach by ingress; (*b*) in the liability to be terminated by any interruption, there being no presumption as to continuance.

But it is only in the case of breach by ingress that the neutral must be specially warned before the penalty can be increased. After a blockade *de facto* has existed any length of time, according to a decision of Lord Stowell[3] it is impossible for those within to be ignorant of the forcible suspension of their commerce; the notoriety of the thing supersedes the necessity of particular notice to each ship. In a case of a blockade *de facto* and attempt by ingress, Sir W. Scott declined to consider the notoriety of the blockade sufficient

[1] *Neptunus*, (1799) 2 C. Rob. 110, 112.
[2] *Vrouw Judith*, (1799) 1 C. Rob. 150, 152.
[3] Ibid.

evidence in the special case of a neutral vessel sailing from a port of a belligerent to the blockaded port of his ally.[1] The court declined to press too rigidly the consequences arising from general inference in this case, because information may be supposed to travel with much uncertainty to a ship lying in belligerent ports. But it seems only reasonable to deduce from this case that in Sir W. Scott's view where the neutral, who attempts to enter a blockaded port, sails from a neutral port, general notoriety of a blockade may be sufficient evidence to him. In view of the improved effectiveness of modern communications, it is a little difficult to suppose that the principle of the decision of the *Tutela* would now be upheld. If Cadiz were blockaded at the present day, under circumstances of general notoriety, the fact would certainly be known at Bordeaux.

In the *Hare*, (1810) 1 Acton's Rep. 252, 261, which was the case of a breach by egress of a *de facto* blockade, Sir Wm. Grant, M.R., observed: "From the general notoriety of the circumstances attending it, the parties should have considered it as an actual blockade in full force and effect."[2] In this case, therefore, ship and cargo were condemned on the ground of notoriety. Sir R. Phillimore observes that—

"the law of blockade underwent a minute examination in a judgment of the judicial committee during the present (*i.e.* Crimean) war, but no new principle appears to have been promulgated. The *Franciska* and the *Johanna Maria*, Reports of Cases in the Admiralty Prize Court and Court of Appeal, vol. i. pt. ii. p. 287."[3]

The *Franciska* was the case of a Danish vessel captured on May 22, 1854, off Lyser Ort, at the entrance of the Gulf of Riga, for a breach of the blockade of that port. The vessel was captured after notification of intention to blockade, but before notification of the fact. At the date of arrest, therefore, it was only a *de facto* blockade. The Right Hon. T. Pemberton observed in the Privy Council—

[1] *Tutela*, (1805) 6 C. Rob. 177. [2] Ibid., *supra*, p. 261.
[3] "International Law," vol. iii. s. 320.

"If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance."[1]

Mr. W. E. Hall considers that "capture on the ground of notoriety would be looked upon with disfavour."[2] It is a little difficult to adopt this conclusion. Notoriety was sufficient evidence of a blockade according to Lord Stowell; and the principle seems to be confirmed, rather than impaired, by improvement of communications. Dr. Lushington, whom Mr. W. E. Hall quotes as his authority, admitted that if the notoriety of a blockade were universal it was adequate to affect neutrals. The point has great interest in connection with the seizures of February, 1905, of vessels proceeding to Vladivostock. While no notification has been given, an impression, for which it cannot be said there is no justification, has prevailed that it is a case of *de facto* blockade.

The French usage has been to require special notification in all cases of ingress. The French official instructions given to Admiral Bouet Willaumez in 1870 were silent about egress; but it seems to be the view of Mr. W. E. Hall that Negrin (p. 213) is right in inferring that they did not require special notification in cases of vessels coming out of a blockaded port. Special notification is necessary in English practice when the neutral vessel sails before the date of the receipt of diplomatic notification by neutral Government, and is required, therefore, in one instance, even when it is not the case of a *de facto* blockade. Mr. W. E. Hall observes that when a special notification is given in English practice, it takes the same form as the French. This consists of an endorsement on the ship's papers of the fact, date, and place of notification. In the *Vrouw Judith*, (1799) 1 C. Rob. 150, Sir W. Scott observed—

[1] The *Franciska*, (1855) 10 Moore, 37, 58; and cf. reference to Lord Stowell's decision, ibid., in the *Adelaide*, *Neptunus*, 2 C. Rob. 111; the *Hurtige Hane*, 3 Rob. 324; the *Rolla*, 6 Rob. 367.

[2] "International Law," 5th ed., p. 696 and note.

"It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner by declaration to foreign Governments; and this would always be most desirable, although it is sometimes omitted in practice: but it may commence also *de facto* by a blockading force giving notice on the spot to those who come from a distance, and who may, therefore, be ignorant of the fact."[1]

It is submitted that the language of Sir W. Scott in this case is not really inconsistent with his observations in the *Mercurius* (1798), 1 C. Rob. 80, 82, where he equally observed that the purpose of public notifications being the information of individuals, that purpose was "better obtained" by personally informing individuals than by public declarations between Governments. The necessity of notification is at least as imperative from the view of the belligerent as it is from that of the neutral. In the *Neptunus,* he observed that a blockade—

"ought by some kind of communication to be made known, not only to foreign Governments, but to the King's subjects, and particularly to the King's cruizers, not only to those stationed at the blockaded port, but to others, and especially considerable fleets, that are stationed *in itinere*, to such a port from the different trading countries that may be supposed to have an intercourse with it."[2]

From the point of view of the belligerent, therefore, public notification of the blockade is by far the most desirable; and it is in this connection that it was probably commended by Sir W. Scott in the *Vrouw Judith.* His observations in the *Neptunus* are of considerable historical interest. They afford a complete explanation of the reason why this country, in most of her great wars, adopted diplomatic notification of blockade. The object was to rouse English squadrons to arrest blockade runners, and the extraordinary success of the operations of the British fleet in the Great War are to be attributed partly to the fact of diplomatic notification of blockade. On one occasion Lord Stowell had eight hundred

[1] *Vrouw Judith*, (1799) 1 C. Rob. 150, 152.
[2] *Neptunus*, (1799) 2 C. Rob. 110, 114, 115.

cases in arrears,[1] a fact which attests the success of the navy in arresting blockade runners. As an instance of the favourable interpretation placed by English Prize Courts on diplomatic notification, it may be mentioned that it was held in the case of the *Adelaide,* (1801) 3 C. Rob. 281, 285, that diplomatic notification may in a reasonable time bind neighbouring States. It is observed by Sir H. S. Maine on this subject—

"Under modern circumstances, where information is conveyed over the civilized world by newspapers and the electric telegraph, it certainly seems that the English practice is sufficient. It is hardly possible that there should be an ignorance nowadays of the existence of an established blockade."[2]

There are many indications that the practice of diplomatic notification has grown in esteem since Hautefeuille denounced it during the American Civil War. Not only is its necessity insisted on by the Institute of International Law, but Bluntschli (s. 832) and Heffter (s. 156) consider that special notification is unnecessary. The recent increase of naval power among the nations of the world seems likely to promote the adoption of diplomatic notification, owing to its possessing, as Sir W. Scott observed, many advantages from the point of view of a naval belligerent.

On the former French view, neutral subjects were not presumed to know of a blockade merely because a belligerent had transmitted a diplomatic notification to the neutral Government. The neutral who attempted to enter a blockaded port was not liable to the penalties imposed for violation of blockade, unless he had received special notification, and made a subsequent attempt to enter. France adopted this practice in blockading the Mexican ports in 1838 and the Argentine Republic. She has also adopted in treaties the view that special notification is necessary.[3] But the fact that

[1] *Per* Dr. Stephen Lushington in the *Leucade,* (1855) 2 Spinks, 228, 238.

[2] Sir H. S. Maine's Lect., "International Law," pp. 108, 109; cf. also Mr. W. E. Hall's "International Law," 698.

[3] With Brazil, 1828 (De Martens, "Nouv. Rec.," viii. 60); Venezuela, 1843 ("Nouv. Rec. Gén.," v. 172); Ecuador, 1843 (ibid., 411); New Grenada, 1844 (ibid., vii. 621); with Guatemala, 1848 (ibid., xii. 11); with Chile, 1846 (ibid., xvi. i. 10); with Honduras, 1856 (ibid., ii. 154); with Nicaragua, 1849 (ibid., 191).

all these treaties have been concluded with the States of South America, previous to the laying of the Trans-Atlantic cable, and none subsequently, seems rather to indicate that, even on the French view, diplomatic notification is sufficient in consequence of the improvement of communication that has taken place in modern times. Above all, in the 1884 blockade of Formosa, she resorted to an official notification of blockade, and entirely abandoned her historic self-imposed obligation to give the notification *spéciale* she has so frequently insisted on by treaty. The French usage of the requisition of special notification has been adopted by treaty between other States. But the dates and parties are as significant in the one case as the other.[1] It is, at least, of historical interest to observe that while it was Russia who, according to Professor de Martens, introduced the usage of notification *spéciale* by the Convention of the Second Armed Neutrality of 1800, she has not affirmed the usage in any treaty concluded since that date.[2]

General Halleck treats official publications of blockade in the newspapers as a third alternative to diplomatic and special notification.

England, in the Great War, relaxed the rule, in the case of a notified blockade, that the act of sailing to a blockaded place is sufficient to constitute the offence[3] when the vessels came from America. This makes it all the more singular that Calvo (s. 2589) should consider that treaties concluded by the United States, stipulating that vessels may sail for a blockaded port notwithstanding the existence of a blockade, have the effect of proving that the United States have acceded to the French usage.[4] This fact is pointed out by Mr. W. E. Hall,

[1] United States and Sweden, 1816 (De Martens, "Nouv. Rec.," iv. 258); Hanseatic Towns and Mexico, 1828 (ibid., "Nouv. Suppl.," i. 687); United States and Sardinia, 1838 (ibid., xvi. 266); Austria and Mexico, 1842 ("Nouv. Rec. Gén.," iii. 448; Argentine Republic and Peru (ibid., 2e Sér. xii. 448); Italy and Uruguay ibid., xii. 664).

[2] Cf. Mr. W. E. Hall's "International Law," p. 696, for list of treaties.

[3] The *Betsey*, (1799) 1 C. Rob. 233.

[4] Treaty U.S. with England, 1806 (De Martens, "Rec.," viii. 585); with Sweden, 1816 (ibid., "Rec.," iv. 258); with Brazil (ibid., ix. 62); with Venezuela, 1836 (ibid., xiii. 560); with Bolivia, 1836 (ibid., xv. 113); with Ecuador, 1839 ("Nouv. Rec. Gén.," iv. 316); with Italy, 1871 ("Archives de Droit Int.," 1874, p. 134).

who does not, however, seem to notice the support given to Calvo's view by the two treaties which he elsewhere expressly states the United States concluded, adopting the French rule that an attempt to enter a blockaded port only incurs the penalty for violation of blockade after special notification on the spot. Sir R. Phillimore in 1857 observed that the justice of the relaxation in favour of vessels coming from a distance was becoming impaired in view of increased rapidity in transit.[1] But since 1857 steam has diminished the duration of voyages by one-half. Except in the case of sailing vessels, doubtless an exception of material importance, it is impossible to see any sufficient reason for introducing an exception to the principle that the act of sailing to a blockade place is sufficient to constitute the offence.

The conditions precedent to the institution of a valid blockade are, therefore, notification and effectiveness. But it is equally necessary that a blockade should be continued effectively.[2]

[1] "International Law," vol. iii. s. 303.

[2] The blockade of Cadiz, Jan.–Oct., 1805, instances the importance of this principle. In January, 1805, Sir John Orde, with a small squadron, instituted a *de facto* blockade of Cadiz. At the time there was a slightly superior Spanish squadron in the harbour, but the bulk of the enemy's fleets were at Brest and Carthagena. In April, Villeneuve came with a large fleet, entered Cadiz, but immediately put to sea again with the other French and Spanish vessels in the harbour on April 10. On April 25 the British Government declared the blockade of Cadiz, a fortnight after Villeneuve had driven off the small squadron of Sir John Orde ("Ann. Reg.," 1805; and observations of Sir W. Scott in the *Triheten*, (1805) 6 C. Rob. 65, 67). Then, on June 8, Lord Collingwood arrived off Cadiz with, however, only a small force. On August 21 Villeneuve returned, and again drove off the small British squadron. He was then blockaded by the joint fleets of Collingwood and Nelson, and the battle of Trafalgar followed. A great number of cases arose from the above state of things. Sir W. Scott observed that it was manifest that Lord Collingwood connected his blockade with that of Sir John Orde, but he could not support this interpretation (*Hoffnung*, (1805) 6 C. Rob. 112, 121). It was held that Villeneuve had raised the blockade on April 10, and a seizure made in May was therefore invalidated, in spite of the fact that the blockade had not been taken off since the notification of April 25. In the Court of Appeal it was held that Lord Collingwood's blockade was a blockade *de novo* and *de facto* (the *Hare*, (1810) 1 Acton's Rep. 252). The decisions of Lord Stowell in the *Triheten* and *Hoffnung* show a scrupulous avoidance of observing a paper blockade. The case of the *Hoffnung* was very complicated, as it affords an instance where notification of blockade is due, not merely from a belligerent to neutral States, but also to the enemy State. The Spanish Government were the implicit owners of some Swedish vessels on which the French Government had laid an embargo. Spain, as the ally of France, had in some manner acquired power over these vessels,

The removal of the blockading force for a different service operates as a legal discontinuance of the blockade, even if only a portion of the force is ordered away, unless the portion left is competent to enforce the blockade. When a prize is pursued so far from the blockading station that a neutral ship may think the blockade is abandoned, the blockade ceases. There was a diversion of this kind during the blockade of Charleston, May, 1861, and the harbour was opened for five days. Lord Lyons took for granted that an interruption had occurred, but the Government of the United States refused to admit any cessation. But it does not operate as a legal discontinuance of the blockade that some of the passes are left unguarded and open by the temporary absence of a portion of the blockading squadron in chastising suspicious vessels which have approached the blockaded port.[1]

The engagement between the *Alabama* and *Hatteras* raised circumstances of the above character. When the *Alabama* approached Galveston, February, 1863, the port was being blockaded by a steam sloop of war and several smaller vessels. The anxiety of the Federal commander to maintain the blockade led to his merely dispatching the *Hatteras*, a vessel of altogether inferior force, against the *Alabama;* which therefore escaped, afterwards to commit such depredations on Federal commerce. The victory of the *Alabama* over the *Hatteras* created great dismay in Federal circles, and it was even said that, single-handed, she could have then done much to impair the validity of the entire Federal blockade. But even at the height of her depredations the North attributed far more importance to the maintenance of the blockade than the capture of the *Alabama*. This circumstance was reproduced,

and utilized them to carry provisions to Spain, where a famine prevailed. The British Government issued an order, from motives of humanity, permitting cargoes of corn to be carried to Spain, with the exception of blockaded ports, without exception as to the property. A notification of the blockade of Cadiz was, under these circumstances, due to the Spanish Government. As it appears that it could not possibly have been made in time, Sir W. Scott decreed restitution of the cargo to the Spanish Government.

[1] *Triheten*, (1805) 6 Rob. 65; the *Hoffnung*, (1805) ibid., p. 112; the *Rolla*, (1807) ibid., 372; the *Fox*, 1 Edwards, 321; *Williams* v. *Smith*, 2 N. Y. R. p. 1; the *Eagle*, 1 Act. R. 65.

on an infinitely more important naval scale, during the Russo-Japanese War. Even when the Vladivostock squadron was in the immediate vicinity of Yokohama and Tokio, Admiral Togo did not desist from his vigilance before Port Arthur. When it is remembered that in 1863 it was even anticipated the *Alabama* might throw some shells into New York, there seems a certain aptness in the parallel. Again, the Vladivostock squadron was ultimately met, like the *Alabama*, by a force specially detailed for the purpose. Such incidents demonstrate the importance of maintaining a blockade.

There is a great difference between a publicly notified blockade and a *de facto* blockade as regards the presumption of its continuance. In the case of the *Neptunus*, (1799) 2 C. Rob. 110, 113, Sir W. Scott said—

> "It is to be presumed that the notification will be formally revoked; till that is done the port is to be considered as closed up, and from the moment of quitting port on such a destination, the offence of violating the blockade is complete, and the property engaged in it is subject to confiscation; it may be different in a blockade existing *de facto* only; there no presumption arises as to its continuance, and the ignorance of the party may be admitted as an excuse, for sailing in a doubtful and provisional destination."

But such a presumption is only a *presumptio juris*, not a *præsumptio juris et de jure*, for that would involve all the evils of fictitious blockade. In the case of a diplomatic blockade, it is incumbent on the claimants to prove that the blockade did not exist at the time of capture. In the case of a *de facto* blockade, it is incumbent on the captors to prove the existence of blockade.[1] It is clear that even in the case of a *de facto* blockade an arrest may be made at a distance from the blockaded port. It has been shown that the English and American usage as regards *de facto* blockades appears quite indistinguishable from the French usage of blockade generally, which only recognizes one species of valid blockade. By the

[1] Phillimore, ii. 290; *Neptunus*, 1 C. Rob. 171; *Circassian*, ii. Wallace, 150; the *Baigorry*, ibid.

French rule an attempt to enter a blockaded port after special notification constitutes a breach of blockade, though at a distance from the blockaded port. The distance alluded to must be supposed to mean no great distance. Ortolan,[1] Hautefeuille,[2] and Bluntschli[3] refuse to admit the right to seize elsewhere than within the blockaded spot, even when a vessel attempts to enter after having received special notification. But Mr. W. E. Hall considers that, after a vessel has received special notification, and then attempts to enter, the duration of her liability to seizure is the same both in French and English practice. Therefore, if after having received special notification she actually enters and comes out without being arrested, she remains liable, either by the French or English usage, to the penalty of violation of blockade till she reaches the end of the voyage.[4]

The Japanese proclamation of the blockade of Port Arthur does not give the slightest ground for suggesting that the Japanese adhere to the doctrine of the "notification *spéciale*." It must therefore be supposed that Japan is in agreement with the United States and England as regards the usage of a public or governmental blockade with merely official or diplomatic notification.

One of the most noticeable features of the later phases of the war is the great number of seizures effected by the Japanese of vessels going to Vladivostock with coal. On February 10, 1905, it was stated that ten seizures had been made in three weeks, and a great number were subsequently effected. In this respect the naval experience of the Japanese has repeated itself; as in the Chino-Japanese War, prize affairs multiplied everywhere in the later phases of the war. If guilty knowledge could be inferred in an individual from general notoriety in the case of a *de facto* blockade, as the Privy Council held in the case of the *Franciska*, (1855) x. Moore, 37, 57, there can be no doubt that the confiscation of vessels carrying coal to Vladivostock in the spring of the present year could be justified on the ground of notoriety and *de facto* blockade.

[1] "Dip. de la Mer," ii. 354.
[2] tit. xiii. ic. i. s. 1, art. 3.
[3] s. 836.
[4] Hall's "International Law," 5th ed., p. 710.

It is quite certain there has been no diplomatic notification; and there is no ground for supposing that vessels were individually warned. There are further material reasons for supposing that an effective blockade exists; it was suggested in a case in the Admiralty Court by a leading counsel, with whose opinion the court seemed to concur. If no other explanation were forthcoming, the Vladivostock captures, with every appearance of sufficient reason, might be ascribed to so many attempts to run a *de facto* blockade, the evidence of whose existence was general notoriety. But it seems that the Japanese prize courts condemned the vessels on the ground that they carried coal (conditional contraband under the Japanese declarations) to a military port. A more defensible conclusion can hardly be conceived. It was held by Sir W. Scott, in the *Jonge Margaretha* (1799), 1 C. Rob. 188, that provisions, though only conditionally contraband, may be confiscated when they are carried to a great port of military or naval equipment, such as Brest, and that the ship is also liable to be confiscated in such circumstances if the master can be proved to know of military and naval preparations transpiring at the port. During the present war Vladivostock, for material purposes, seems to be in *pari materia* with a place like Brest during the great war. Vladivostock, like Brest, is a military, not a commercial, port, and evidence of general notoriety can be evidence of nothing if it is not true that great military preparations are going on there. The decision of the Japanese prize courts seem thus to be in complete harmony with probably the best known decision of Lord Stowell on contraband.

How blockade is terminated.

A *de facto* blockade necessarily ceases directly the fact ceases; and, therefore, captures made after the date of the cessation will be released in a prize court. A blockade by notification is to be presumed *primâ facie* to continue till the notification is revoked. But it is only a *primâ facie* continuance, and "the government of the United States was undoubtedly in the wrong in holding the opinion put forward by it in 1861, that a blockade established by notification continues in effect until notice of its relinquishment is given by

proclamation."[1] A vessel bound for a blockaded port is not liable to seizure in the interval which may elapse between the first absence of the blockading squadron and the public notification of the discontinuance of the blockade. The removal of the blockading squadron, therefore, operates, according to English and American usage, as the termination of a blockade, whether it is a diplomatic or a *de facto* blockade.

But the decisions of the courts of the United States and the prize courts of this country are in perfect harmony as to a very definite exception to the above rule. In the case of the *Hoffnung*, (1805) 6 C. Rob. 112, 116, 117), Sir W. Scott observed that "when a blockading squadron is driven off by adverse winds, they (*i.e.* neutrals) are bound to presume it will return, and that there is no discontinuance of the blockade."[2] The exception arising from the blockading squadron being blown off by adverse winds applies equally to a blockade *de facto* as to a blockade by diplomatic notification.[3]

The absence of the blockading squadron operates as a discontinuance of the blockade when it is due to a rebuff by a superior force of the enemy. When a squadron is driven off by a superior force, "the neutral merchant is not bound to foresee or conjecture that the blockade will be resumed; and, therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted."[4] In the *Triheten*, (1805) 6 C. Rob. 65, 67, a case of a blockade of Cadiz by notification, Sir W. Scott observed that the court would require the fact to be proved that the blockade of Cadiz continued an effective blockade—"because it certainly is notorious that the British squadron was driven off fifteen days previously. It must be shown the actual blockade was

[1] Hall's "International Law," 5th ed., 705; referring to letter of Mr. Seward to Lord Lyons, May 27, 1861; ap. Bernard, 238.

[2] Cf. also the dicta of Sir W. Scott in the *Columbia*, (1799) 1 C. Rob. 154, 156; in the *Neptunus*, (1799) 1 C. Rob. 170, 171; *Juffrow Maria Schroeder*, (1800) 3 C. Rob. 147, 155.

[3] *Per* Sir W. Scott in the *Neptunus*, ibid.

[4] The *Hoffnung*, (1805) 112, 117, *per* Sir W. Scott.

resumed." A blockade also terminates when the vessels constituting the blockading squadron are diverted for other duty,[1] or if the blockade is irregularly maintained, but not because licences are granted to particular individuals. The mere arrest of vessels attempting to break the blockade is enough to prove the blockade is effective, though they are afterwards released without being brought in for adjudication.

On this topic, as on so many others of the law and right of blockade, there is a wide variance between the Continental and the English and American view. The Armed Neutralities provided nothing on this subject of the termination of blockade, and it never seems to have been regulated by treaty. But the instructions given to naval officers by the French Government in 1870 provided that the neutral recovered his right of entering the blockaded port if the French squadrons were obliged, by any cause whatever, to absent themselves from the blockaded port. Heffter (s. 155) does not hold that temporary absence entails cessation of a blockade. Ortolan (ii. 344) considers that a neutral vessel can enter the blockaded port without incurring the penalties of violation of blockade, if weather has caused the temporary absence of the blockading squadron.

Hautefeuille holds (t. ix. c. ii. s. 1, art. 1) that interruption from any cause terminates the blockade. But the effect of the suggested rules of the proposed Règlement des Prises Maritimes, adopted by the Institut de Droit International, is that the vessels of the blockading squadron need not be anchored, and that the fact that they have been driven off by bad weather does not operate as a discontinuance of the blockade.[2]

Resumption of blockade after discontinuance or abandonment.

In the case of the *Hoffnung*, (1805) 6 C. Rob. 112, the case arose of a blockade by notification discontinued owing to the blockading squadron having been driven off by a superior force of the enemy. Sir W. Scott observed on the subject of resumption of blockade, after pointing out that the raising

[1] Gen. Halleck's "International Law," vol. ii. p. 191, and cases collected in note, ibid.

[2] "Ann. de l'Institut," 1883, p. 218.

of a former blockade by a superior force acted as a total defeasance of that blockade and its operations, that—

"It should be again renewed by notification before foreign nations could be affected with an obligation of observing it as a blockade of that species still existing. Under this view I have already intimated my opinion that the mere appearance of another squadron would not restore it, but that the same measures would be necessary for the recommencement that had been required for the original imposition of the blockade, and the foreign merchants were not bound to act on any presumption that it would be *de facto* resumed."

It was therefore held that a Swedish vessel which had sailed after the squadron of Sir John Orde had been driven off Cadiz, and after Lord Collingwood had resumed the blockade, should be restored on payment of captors' expenses, because there had been no notification of the blockade on its resumption.

In a case in the Court of Appeal arising out of this same blockade, Sir W. Grant held that the blockade instituted by Lord Collingwood after Sir John Orde had been driven off was a blockade *de novo*, and that though not a blockade recommenced, it was to be considered an actual blockade in full force and effect from the general notoriety of the circumstances attending it.[1] The case therefore shows that though a public or governmental blockade cannot be resumed after total defeasance by a *de facto* blockade technically, a *de facto* blockade may be instituted *de novo* after a very short interval, which is legally valid. The French instructions of 1870 prove that "tout blocus levé ou interrompu doit être rétabli et notifié de nouveau dans le formes prescrites." As it "has lately become customary for the French Government at the commencement of a blockade to notify the fact of its existence to foreign Governments as a matter of courtesy, though their subjects are not considered to be affected by notice through them,"[2] French usage has become harmonious with English and American usage on the subject of resumption

[1] The *Hare* (1810), Acton's Rep. 252, 261.
[2] Hall's "International Law," 5th ed., 695.

of a blockade. They now issue a diplomatic notification of blockade, and though they do not attach the same consequences to it as the English, they apparently consider, judging from the instructions of 1870, that a notified blockade, once discontinued, can only be resumed by notification, as Lord Stowell decided in the *Hoffnung*. The Règlement des Prises, arts. 35 and 38, of the Institut de Droit International provides—

"If the blockading squadron depart from their station for any motive other than exigencies of weather, the blockade may be considered as having ceased, and must then be declared and notified anew."

It is also provided by art. 37 that the same formalities are necessary after the re-establishment of a blockade which may have ceased to be effective. The articles of the Prize Code of the Institute of International Law seem, therefore, in harmony with the principles of English Prize Law as laid down by Lord Stowell.

What acts constitute a breach of blockade.

In the case of the *Betsey*, (1798) 1 C. Rob. 92A, Sir W. Scott observed that—

"On the question of blockade three things must be proved: (1) the existence of an actual blockade; (2) the knowledge of the party; and (3) some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet after the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy."

A neutral may violate a blockade either by force or fraud.[1] Sir H. S. Maine observes—

Sir H. S. Maine on blockade running.

"It is the act of secretly evading a force on the whole adequate which constitutes the offence that subjects a neutral ship to capture—what is called 'running the blockade.'"[2]

[1] Hall's "International Law," 5th ed., 708.

[2] "International Law," p. 109.

Ignorance of law is no excuse for violating a blockade.[1] In the *Hurtige Hane*, (1801) 3 C. Rob. 324, where the cargo belonged to Barbary merchants, and the blockade broken was that of Amsterdam, notified June, 1798, Sir W. Scott considered that even persons to whose transactions the law of nations was not generally applied in its full vigour could not be supposed to be ignorant of a point like the breach of blockade—"one of the most universal and simple operations of war." The first and most elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any kind, is not a new operation of war, it is almost as old and as general as war itself.[2]

Ignorance of law no excuse for violating a blockade.

Ignorance of fact can be successfully pleaded either where a sufficient time has not elapsed between the notification of a public blockade and the seizure of the neutral for the presumption of knowledge to arise,[3] or where the blockade is public, and the neutral is not seized on attempting to enter,[4] but allowed to go in through remissness.

Ignorance of fact when valid excuse.

Even in the case of a *de facto* blockade, the notoriety of the thing may supersede the necessity of particular notice to each ship, and no notice is necessary after the blockade has existed *de facto* for any length of time.[5] Where the master and consignees have actual knowledge of the blockade no notice is necessary. This is the case even where a treaty subsists between the States of the claimant and captor respectively, stipulating for a previous warning, when the parties can be affected with a knowledge of the fact.[6]

Ignorance of the continuance of a notified blockade is no excuse in the case of a neutral coming out of the blockaded port,[7] though ignorance of a *de facto* blockade may be pleaded by a neutral vessel sailing between different ports of the belligerent who is blockaded.[8]

[1] *Per* Sir W. Scott in the *Adelaide*, (1801) 3 C. Rob. 281, 285.
[2] Ibid., *supra*, p. 327.
[3] *Jonge Petronella*, (1799) 2 C. Rob. 131; the *Adelaide*, (1801) 3 C. Rob. 281.
[4] *Juffrow Maria Schroeder*, (1800) 3 C. Rob. 147.
[5] The *Vrouw Judith*, (1799) 1 C. Rob. 150, 152.
[6] The *Columbia*, (1799) 1 C. Rob. 154, 156.
[7] *Welvaart van Pillaw*, (1799) 2 C. Rob. 128.
[8] *Tutela*, (1805) 6 C. Rob. 177.

The offence of breach by ingress depends materially upon the evidence of the blockade,[1] but a ship coming out of a blockaded port is in the first instance liable to seizure in all cases; and to obtain release, the claimant will be required to give very satisfactory proof of the innocency of his intention.[2]

In case of a diplomatically notified blockade, offence consists in sailing to blockaded place.

In the case of a notified blockade the act of sailing to a blockaded place, with the intention of evading the blockade, is an overt act constituting the offence.[3] It may be different in a blockade existing *de facto* only; in that case no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on "a provisional or doubtful destination."[4] Therefore, in the case of attempts to enter a blockaded port, the doctrine of continuous voyages is applicable where the blockade is diplomatically notified, but not where it is a *de facto* blockade. It would be "a most absurd application" of the principle that a neutral vessel is not at liberty to come out a blockaded port with cargo, if a vessel were to be considered exempt, after egress with cargo, because she has escaped the interior circumvallation of the blockading squadron, and has advanced some way on her voyage.[5] In such a case there is no other natural termination of the offence but the end of that voyage. But the neutral is not liable to confiscation for breach of blockade when the blockade is remiss, and not known to the belligerent who arrests her.[6] This case is quoted by Sir R. Phillimore,[7] but it was the case of a privateer, and it seems very doubtful from the observations of Sir W. Scott in that case whether a privateer was a proper vessel to effect an arrest for violation of blockade.[8]

The doctrine of continued

The principle of continued voyage was applied by Lord

[1] The *Neptunus*, (1799) 2 C. Rob. 110, 114.

[2] The *Frederic Molke*, (1798) 1 C. Rob. 86, 88.

[3] The *Columbia*, (1799) 1 C. Rob. 154, 156; the *Neptunus*, (1799) 2 C. Rob. 110, 113.

[4] *Neptunus*, (1799) 2 C. Rob. 110.

[5] *Welvaart van Pillaw*, (1799) 2 C. Rob. 128, 129.

[6] *Christina Margaretha*, (1805) 6 Rob. p. 63.

[7] "International Law," vol. iii. p. 404.

[8] Ibid., p. 64. But cf. Orders in Council, January 7, 1807; text in Phillimore, "International Law," vol. iii. p. 412.

Stowell to the law of blockade in a case where it was sought to bring out a cargo through the mouth of a blockaded river in lighters, and then to ship them on the neutral vessel at an interposed port, the vessel having previously come out of the blockaded port in ballast.[1] If such a cargo had been brought by canal navigation from the blockaded port to an interposed neutral port, the principle of continued voyage would not afterwards apply to the vessel on which it was shipped,[2] because the legal consequences of blockade depend on the means of blockade, and a blockading force can only be applied externally.

voyage applied to violation of blockade by Lord Stowell.

Physical limitation of belligerent right of blockade.

In the case of the *Circassian*, (1864) 2 Wall. 135, vessel and cargo were condemned as lawful prize for violating the blockade of New Orleans, the arrest being made about eight miles from the north coast of Cuba, while the vessel was proceeding to Havana, the interposed neutral port. Chief Justice Chase observed—

American decisions, applying doctrines of continued voyage to law of contraband.

"The destination to Havana was merely colourable. It proves nothing beyond a mere purpose to touch at that port.... It is quite possible that Havana, under the circumstances, would have turned out to be, as was insisted in argument a *locus pœnitentiæ* . . . but future possibilities cannot change present conditions."[3]

Mr. W. E. Hall strongly condemns the decision in the case of the *Circassian*, saying that—

Criticism of Mr. W. E. Hall on the decision in the case of the *Circassian*, (1864) 2 Wall. 135.

"A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or, in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended to violate the blockade if possible, notwithstanding that the design might have been abandoned on the information received at the neutral port."[4]

But it may be remembered that inquiry at an interposed port is only a plea in excuse if the existence of the blockade is not known at the inception of the voyage, or its discontinuance is expected. Neither of these facts was found by the

[1] The *Maria*, 6 C. Rob. 201; the *Charlotte Sophia*, ibid., p. 204; and the *Lisette*, ibid., p. 394.

[2] The *Stert*, (1801) 4 C. Rob. 65; the *Ocean*, (1801) 3 C. Rob. 297.

[3] Ibid., *supra*.

[4] "International Law," 5th ed., 710.

court in the case of the *Circassian*. But unless such facts exist, the act of sailing to a blockaded place is sufficient to constitute the offence. Further, in the case of the *Circassian* the intention was clearly proved. There was spoliation of papers at the moment of capture. A memorandum of affreightment was found by which the agent of the shippers engaged to force the blockade, and undertook that the goods should not be disembarked except at New Orleans.[1]

The court decreed confiscation of vessel and cargo on the ground that it was "not at all certain" that the master would have abandoned his purpose to break the blockade after arrival at the interposed neutral port of Havana. The vessel was therefore condemned because it was not proved she might have been innocent. This doubtless conflicts with the principles of the criminal law, if they are deemed applicable, but, as will be seen, it does not at all conflict with Prize Law as declared by Lord Stowell in some well-known cases.

One ground for the condemnation of the *Circassian*, considered by the court to be conclusive in itself, was the spoliation of papers at the moment of capture. But such an act, in cases of contraband, was admitted by Lord Stowell to be very material, though he declined to give it the effect of the American court in the case of the *Circassian*. By the law of France and some other countries, spoliation of papers at the time of capture involves condemnation.

According to Lord Stowell, violation of blockade was a criminal act,[2] even "a highly criminal act."[3]

As has been seen, the decision in the case of the *Circassian* was to the effect that confiscation must take place even where the innocence of the intention of the neutral master is a possible hypothesis. But, in the following cases, Lord Stowell confiscated vessel and cargo for breach of blockade, though he admitted the possibility of the innocence of the intention of the neutral master. At a time when there was a blockade of the Seine, the master, on the alleged explanation of taking a

[1] The *Circassian*, (1864) 2 Wall. 135, 152.
[2] The *Frederic Molke*, (1798) 1 C. Rob. 86, 88.
[3] The *Hurtige Hane*, (1799) 2 C. Rob. 124.

pilot, approached to within a mile of Cape la Heve. The court considered that he must have been intending to break the blockade. Sir W. Scott observed—

"It is a possible thing that his intention was innocent, but the court is under the necessity of acting on the presumption which arises from conduct, and of inferring a criminal intention."[1]

According to Lord Stowell, violation of blockade a crime by international law.

But where presumptions operate in criminal law in this country, they do not alter the rule as to the weight of the evidence. Therefore, though Sir W. Scott considered violation of blockade a crime, he could not have considered it a crime by the municipal law of this country. But he must have considered it an offence, *ex vi terminorum*, by international law.

Another of Sir W. Scott's decisions shows that the principles of English criminal law are not applicable to the violation of blockade, for in the case of the *Shepherdess*, (1804) 5 C. Rob. 262, he held drunkenness was not pleadable to a charge of violation of blockade. But international law, Sir W. Scott considered,[2] is founded on the civil law, and by the civil law drunkenness is no excuse for crime. As Lord Stowell always alluded to violation of blockade as a crime, and considered the conveyance of contraband as fraud, it must be considered that he regarded both acts as a crime against international law. The clear tendency in international law to minimise neutral obligation, to which various causes have contributed, has caused neither the violation of blockade nor the carriage of contraband to be considered a crime according to the present view of international law.[3]

Violation of blockade not considered a crime according to present view of international law.

In the case of the *Bermuda*, (1865) 3 Wall. 514, the doctrines of continued voyage and of blockade were jointly applied where a vessel sailed from Liverpool, and, after touching at St. George's, Bermuda, was captured a few days afterwards off the coast of Great Abaco Island, an English colony, but not

[1] *Charlotte Christine*, (1805) 6 C. Rob. 101, 104.

[2] The *Maria*, (1799) 1 C. Rob. 340, 363.

[3] Cf. Wheaton's "International Law," ed. 1905, p. 689; and letter of Professor T. E. Holland, *Times*, Nov. 29, 1904.

within territorial waters. It was admitted she was not steering to Charleston, but to Nassau.

Chief Justice Chase observed—

"It makes no difference whether the destination to the rebel was ulterior or direct; nor could the question of destination be affected by transhipments at Nassau, if transhipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favourite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transhipments intervene."[1]

Mr. W. E. Hall considers that these two decisions of the courts of the United States during the American Civil War "strained and denaturalized the principles of English blockade law to cover doctrines of unfortunate violence."[2] In the case of the *Bermuda* he apparently thinks that the intention to tranship was not in controversy, and that on this ground the confiscation of vessel and cargo was unjustifiable.

But the decision in the case of the *Bermuda* seems to have proceeded on the ground that the vessel was an enemy vessel. The court considered it established that the *Bermuda* was under the authority and control of the Confederate agents in Liverpool, who were also consignees of the entire cargo, a portion of which consisted of contraband in the strictest sense of the word. The hirers of the vessel were also known to have been in close communication with the leaders of the Confederacy. Moreover, the case presented "an unusual aggravation of spoliation of papers." Chief Justice Chase considered that the British ownership of the *Bermuda* was mere pretence, and that the Pennsylvanian District Court had rightly condemned the vessel as enemy property.[3] If, however, the *Bermuda* was not an enemy ship, the confiscation of vessel

[1] Cf. Wheaton's "International Law," ed. 1905, p. 553.
[2] "International Law," 5th ed., 709.
[3] The *Bermuda*, (1865) 3 Wall. 514, 551, p. 551.

and cargo might yet have been justified on the ground of carriage of contraband. Viewed in this light, it was an aggravated case, since the entire cargo belonged to the hirers of the vessel, part of it consisted of cannon and rifles, and there was spoliation of papers. The fact that the hirers of the *Bermuda* were the political agents of the Confederacy in this country seems practically conclusive as to the intention with which the vessel sailed.

It may be questioned whether transhipment was intended in the case of the *Bermuda*.[1] Even assuming it to be so, according to three well-known decisions of Lord Stowell, an actual, much less an intended, transhipment has not the effect of evading the commission of a violation of blockade.

Transhipment of cargo has not the effect of a successful evasion of the law of blockade.

In the case of the *Maria*, (1805) 6 C. Rob. 201, 202, 203, the facts shown in evidence were that, when the Weser was blockaded, a cargo was sent in lighters from Bremen to the Jade, and there transhipped on a vessel which had gone from the Weser to the Jade in ballast. The vessel was afterwards captured in the North Sea. Restitution was decreed in this instance because of special relaxations granted by the English Government. Sir W. Scott observed—

"That they (*i.e.* the goods) were brought through the mouth of the blockaded river for the purpose of being shipped for exportation would subject them to be considered as taken on a continuous voyage, and as liable to all the same principles that are applied to a direct voyage, of which the terminus *a quo* and the terminus *ad quem* are precisely the same as those of the more circuitous destination."

In the *Lisette*, (1807) 6 C. Rob. 387, the vessel sailed from the Elbe under a charter-party to take on board a cargo of goods, which were to be sent from the Elbe in lighters. The goods were accordingly so shipped, and sailed on September 6, and were captured on the 26th, after the blockade of the Elbe had been notified to be withdrawn. On the latter ground the vessel was discharged. But if the blockade had not been withdrawn, Lord Stowell clearly indicated both ships and cargo would have been confiscated, saying—

[1] Cf. the judgment of Chief Justice Chase, ibid., *supra*, p. 558.

"I have been compelled in principle to hold that when goods are brought down from the blockaded port to a neighbouring port, on purpose to be shipped for the enemy's country, an adventure so conducted is nevertheless a breach of blockade."[1]

There are cases where egress is as much a violation of blockade as ingress under the same circumstances, and it does not seem material that in the case of the *Bermuda* the transhipment was to take place on ingress, while in the cases adduced from Lord Stowell's decisions the transhipment was to take place on egress. But assuming this, transhipment cannot be considered a ground for impugning the decision in the case of the *Bermuda*.

Rule of Supreme Court of the United States during Civil War as regards blockade of river partly in neutral territory.

Mr. W. E. Hall observes that during the American Civil War the courts of the United States conceded that trade to Matamoras, on the Mexican shore of the Rio Grande, was perfectly lawful; but the Supreme Court laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan territory; and in the case of vessels captured for being north of that line, refused, while restoring them, to allow their costs and expenses.[2] It is to be hoped, Mr. W. E. Hall adds, "that a rule so little consistent with the rights of neutrals to uninterrupted commerce will not be drawn into a precedent." In the *Peterhoff*, (1866) 5 Wall. 28, 52, Chief Justice Chase considered the case in point was the decision of Sir W. Scott in the *Frau Ilsabe*, (1799) 4 C. Rob. 63, so far as there was any question of violation of blockade. In that case the notified blockade of Holland was held not to be violated by a destination to Antwerp, and the Scheldt was treated as a conterminous river, not within Dutch territory. As this case was expressly followed in the case of the *Peterhoff*, it was there held, also, that there had been no violation of blockade, Chief Justice Chase observing that:

[1] Cf. also case of *Charlotte Sophia*, 6 C. Rob. 204.

[2] Hall's "International Law," 4th ed., p. 738. referring to the *Peterhoff*, 5 Wallace, 54; the *Dashing Wave*, ibid., 170; the *Volant*, ibid., 178; the *Science*, ii. 179.

"What has been said sufficiently indicates our opinion that the ship and cargo are free from liability to violation of blockade."[1] But the vessel carried contraband in the strictest sense of the term, and therefore restitution was only decreed on payment of costs and expenses. All that the court, therefore, decided was, that there was a *primâ facie* ground for seizure. It is a little difficult, under these circumstances, to understand Mr. W. E. Hall's grave censure of the decision in the case of the *Peterhoff*.

In the other three cases adduced by the same writer, the neutral vessel voluntarily placed itself near the blockaded coast; and this was the ground on which the court refused costs and expenses, considering that the circumstances fully warranted sending in for adjudication.[2]

Chief Justice Chase observed—

"We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, as far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might easily be introduced into the blockaded region."[3]

It cannot be said that any of the three decisions conflicts with the law of blockade as enunciated by Lord Stowell, unless, indeed, they involve a too mild construction of it. All three vessels were anchored close to the Texan shore within cannon shot. But these are circumstances which Lord Stowell construed as certain evidence of intention to break a blockade. He declared that *fuge litus* was the duty of the neutral with regard to a blockaded spot, and that if he is found there, he must account for his being in such a situation most satisfactorily, otherwise, if approach to an interdicted spot was allowed, the whole purpose of

[1] The *Peterhoff*, (1866) 5 Wall. 28, 57.
[2] *Dashing Wave*, (1866) 5 Wall. 170; *Science*, ibid., 179; *Volant*, 180.
[3] Ibid., *supra*, p. 176.

blockade would be rendered nugatory.[1] In the case of the *Teresita*, (1865) 5 Wall, 182, the United States court appeared to have followed the decision of Lord Stowell in the *Arthur* (*supra*). The *Teresita* was restored, the captors paying costs and expenses because she had drifted involuntarily into Texan waters. Professor T. E. Holland appears to approve of these decisions.[2]

On the point of the effectiveness of a blockade, the decisions of the courts of the United States during the Civil War seem to contravene the principles of the law of blockade as enunciated by Lord Stowell. A neutral owner is not entitled to give the master of his vessel speculative instructions as to the greater or less probability of the termination of the blockade, and to send his vessel to the very mouth of a blockaded river, and say, if you do not meet with the blockading force, enter—if you do, ask a warning, and proceed elsewhere. The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry. This is the rule, even where the Consuls of the State to which the neutral vessel belongs have informed the master that the blockade would be raised before the vessel arrived.[3] Whether or not an intention to break a blockade be regarded as criminal, there can be no liability to confiscation without the intention to violate the blockade. Where there is no intention to violate the blockade, but merely to sail to a blockaded port, the penalty of violation of blockade will not be incurred.[4]

In order to incur penalty of law of nations for violation of blockade, there must be intention on part of neutral.

Knowledge of the existence of the blockade and an intention to violate it are indispensable. Knowledge and intention are distinct; sometimes one will be presumed, while the other will require to be proved. Knowledge of the existence of a blockade, according to English and American usage, is necessarily presumed in the case of a governmental blockade

Knowledge of fact of blockade and intention to violate it, distinct.

Knowledge and intention may be presumed in the case of a diplomatically notified blockade.

[1] *Charlotte Christine*, (1805) 6 C. Rob. 101; the *Gute Erwartung*, (1805) 6 C. Rob. 182; *Neutralitet*, ibid., 30; the *Arthur*, (1810) Edw. 202.

[2] *Times*, July 13, 1904.

[3] The *Spes and Irene*, (1804) 5 C. Rob. 76.

[4] *Medeiros* v. *Hill*, (1832) 8 Bing. 231; *Naylor* v. *Taylor* (1829), 4 Mann. and Ry. Rep. 526; 9 S. C. B. and C. 718.

diplomatically notified,[1] and the intention in such a case is presumed from the mere act of starting for the prohibited port.[2] General Halleck points out that the offence of violation of blockade consists in the attempt to enter, and by no means need extend to actual entrance into the prohibited port. In a case where an American vessel was taken on the voyage to the blockaded port, Sir W. Scott said—

Attempt to enter blockaded port incurs penalty without actual entrance.

"It is said that the vessel had not arrived; that the offence was not actually committed, but vested in intention only. On this point I am clearly of opinion that the sailing with an intention to violate the blockade of the Texel, was a beginning to execute that intention, and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently evaded."[3]

Actual entrance is not necessary to constitute the offence even when seizure can only be made on the spot, as in the case of a *de facto* blockade. A mere attempt after warning is sufficient in this case. In the case of a notified blockade an attempt may take place hundreds of miles from the prohibited port, since "the act of sailing to a blockaded place is sufficient to constitute the offence."[4]

Only two exceptions to rule that attempt to enter prohibited port constitutes violation of blockade.

Particular licence.

Physical necessity.

The exceptions to the rule that it is a breach of blockade for a neutral to attempt to enter a blockaded port are only two in number (*a*) when the neutral has a licence from the Government of the blockading State to enter the blockaded port,[5] and (*b*) where the neutral has the excuse of physical necessity because he requires water or provisions. A Spanish vessel, in distress, on her way from New York to Havannah, by leave of the admiral commanding the squadron, put into Port Royal, S.C. (then in rebellion and blockaded by a fleet of the United States), and was there seized and made use of by the Government of the United States. She was afterwards condemned as a prize. The Supreme Court decided that she was not a lawful prize or subject to capture, and that

[1] *Neptunus*, (1799) 2 C. Rob. 110, 112.
[2] Ibid., p. 113.
[3] The *Columbia*, (1799) 1 C. Rob. 154, 156.
[4] *Per* Sir W. Scott in the *Neptunus*, (1799) 2 C. Rob. 110, 114; and cf. Sir R. Phillimore's "International Law," vol. iii. s. 308, referring to decision of Chief Justice Story in the *Nereide*, 9 Cranch (Amer.), pp. 440, 446.
[5] The *Forest King*, Blatchf. P. C. 45.

her owners were entitled to a fair indemnity, though it might well be doubted whether the case was not more properly a subject for diplomatic adjustment.[1] The case is quoted in Halleck's "International Law" (ii. 205 and note), as showing that physical necessity creates an exception to the rule that it constitutes a breach of blockade for a neutral vessel to enter a blockaded port. In its other developments it affords an instance of the Droit d'Angarie, and a legitimate exercise of that right, unlike the action of the Germans in 1871, when British colliers were sunk in the Seine. In the case of the *Charlotta*, (1810) 1 Edw. 252, the excuse of alleged distress was admitted after the delivery of an opinion of the Trinity Masters that the state of the wind and other circumstances made it impossible for the vessel to proceed to any other port than the blockaded one—the Texel. Sir W. Scott observed in this case that the legal presumption that a vessel going into a blockaded port goes there for the purposes of trade, is not ousted by the fact of her being taken coming out without having delivered her cargo. The delinquency of fraudulent intention is consummated, and the vessel becomes subject to confiscation if she goes in with the intention of disposing of the cargo, and only refrains from doing so owing to prohibitory decrees or the state of the market.

Sir W. Scott's strictly conditional construction of excuse of physical necessity.

Sir W. Scott used only to admit the want of water and provisions as an excuse for entering a blockaded port by a neutral where "great necessity" or "the clearest necessity" could be satisfactorily explained to exist. It would be a case of great necessity justifying the entrance of a blockaded port by a neutral when there was no other port except the blockaded port into which the neutral could go when he was in want of provisions. In the *Hurtige Hane*, (1799) 2 C. Rob. 124, a Danish vessel alleged the want of water and provisions as an excuse for going into Amsterdam, a blockaded port, and Sir W. Scott refused to admit the excuse, observing that—

> "It is usual to set up the want of water and provisions as an excuse, and if I were to admit pretences of this sort, a blockade would be nothing more than an idle ceremony."

[1] The *Nuestra Señora de Regla*, 17 Wall. 29.

When the master of a neutral is in difficulty as to where he should go, the neighbourhood of a blockaded port cannot be considered as the fit *locus deliberandi* of his future plans. The rights of blockade could no longer exist to any purpose if a master could lie to in such a vicinage; he would stay, in all cases, until an opportunity offered itself of slipping into the interdicted port.[1] But an intention to enter a blockaded port is not a breach of blockade—there must be an attempt to enter, knowing the fact of blockade.[2] Particular licences do not vitiate a blockade, and on this ground both egress with cargo and ingress may be made without any liability to penalty.[3] But a licence expressed in general terms to authorize a ship to sail from any port with a cargo will not authorize her in sailing from a blockaded port with a cargo taken in there. To exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the licence, otherwise a blockaded port will be taken as an exception to the general description in the licence.[4] It is no excuse for violation of blockade that the neutral master is compelled by the authorities of the blockaded place to sell his cargo there, as this would empower the State whose port is blockaded to mitigate the effect of a blockade. In the case of the *Charlotte Christine*, (1805) 6 C. Rob. 101, the mouth of the Seine being interdicted, a Danish vessel made for Cape la Heve with the object of taking a pilot for Caen, but stood within one mile of the shore after the master perceived a pilot boat to be coming out to him, and on this ground the court confiscated both vessel and cargo. Sir William Scott observed in this case—

Master of neutral vessel ought not to deliberate as to his course in the vicinage of a blockaded port.

A particular licence only excuses entrance into blockaded port when the port is specially indicated in it.

"Whatever the equivocal cause of such a situation may be, a person cannot be allowed to approach so near to a blockaded port so as to place himself almost within the effectual protection of the shore, and with no necessity existing. To allow such an approach would render the whole purpose of blockade nugatory."[5]

[1] *Apollo*, (1804) 5 C. Rob. 286, 290.
[2] *Fitzsimmons* v. *The Newport Insurance Company*, (1808) 4 Cranch, 185.
[3] The *Fox*, (1811) 1 Edw., 320.
[4] The *Byefield*, (1809) 1 Edwards, 190.
[5] The *Byefield*, (1809) 1 Edwards, 103.

A neutral vessel may not sail to the mouth of a blockaded port to inquire whether a blockade, of which the owner has received previous formal notice, is still in existence or not.[1] But such inquiry, in the case of vessels coming from a distance, may be made in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud.[2]

In a later case, the *Posten Hyll*, August 8, 1799, a Danish ship from Drontheim to Amsterdam, taken off the Texel, was proceeded against for a breach of the blockade of Amsterdam. The same excuse was made, that they expected to receive information on the spot. The court said, "Ships must call somewhere to obtain information, for the court will not allow the information to be obtained at the mouth of the blockaded port." It must be remembered that the court only introduced the relaxation in the case of American ships, because America was then two months' voyage off. The principle of these decisions possibly remains, but it must obviously be modified in view of the improvement in modern means of communication.

When inquiry may be made at the mouth of blockaded port.

A case in which the circumstances are very peculiar may justify inquiries being made at the mouth of the blockaded port.[3] Thus, in a case arising out of the paper blockade of Holland instituted by Great Britain, retaliatory to the Berlin decree, restitution of the vessel and cargo was decreed when there were definite instructions issued to the master of an American ship to inquire of certain British cruisers lying off Heligoland, and not forming part of the blockading squadron, if the blockade of the Elbe was subsisting.[4] The evidence shows that the instructions to the master in this case were to make inquiry at the Eyder, which is twenty miles from the Elbe, the blockaded river, though on the way thither. It also appeared that vessels always proceeded first to Heligoland, in order to get pilots, treating it as the entrance of the Elbe or Eyder. The case was further complicated by the

In the case of conterminous blockaded and non-blockaded rivers.

[1] The *Spes and Irene*, (1804) 5 C. Rob. 76, 81.

[2] The *Betsey*, (1799) 1 C. Rob. 332.

[3] Phillimore's "International Law," vol. iii. s. 204; referring to *Little William* (1809) 1 Acton, 141.

[4] The *Little William*, (1809) 1 Acton, 141.

relaxations introduced, as far as inquiry was concerned, in favour of American vessels.

Neutral master may not deviate into "the roads" of a blockaded port.

A ship and cargo were condemned for breach of blockade in a case where the vessel deviated, under an alleged necessity which was not supported by evidence, into "roads" forming part of a blockaded port, for the purpose of procuring a pilot.[1] A neutral vessel cannot be permitted so far to interfere with the exercise of a blockade as to expose the force maintaining it to the annoyance of the enemy's guns. Therefore, even in a case where the vessel was twenty miles off the blockaded port when seized, ship and cargo were confiscated, because the master admitted that he was steering when seized in the direction of the blockaded port and would have gone close under the land in its immediate vicinity.[2] A vessel may not proceed up a blockaded river for the purpose of procuring a pilot to proceed up a non-blockaded river on the same coast. It is not permissible for a neutral vessel to go up to a blockading squadron to inquire for a pilot.[3]

Breach of blockade by egress.

A valid excuse for egress is not necessarily a valid excuse for ingress, though it may be, as in the case of particular licences.

It is altogether unlawful to enter in ballast,[4] but a ship that has entered previously to the blockade may retire in ballast.[5] A vessel may retire with cargo put on board before a blockade.[6] But the time of shipment is material,[7] and the goods must have been either actually shipped or put on lighters before the date of the blockade, and not merely have been warehoused.[8] A neutral ship may retire from a blockaded port with a cargo of goods which have been found unsaleable, or are otherwise *bonâ fide* withdrawn.[9]

[1] *Neutralitet*, (1805) 6 C. Rob. 30.
[2] *Gute Erwartung*, (1805) 6 C. Rob. 182.
[3] The *Arthur*, 1 Edw. Rep. 202.
[4] The *Comet*, (1808) 1 Edw. R. 32; the *Charlotte Christine*, (1805) 6 C. Rob. 103; the *Charlotte*, (1810) 1 Edw. R. 252.
[5] The *Juno*, (1799) 2 C. Rob. 119.
[6] The *Juno*, (1799) 2 C. Rob. 119.
[7] The *Betsey*, (1798) 1 C. Rob. 93.
[8] The *Rolla*, (1807) 6 C. Rob. 371.
[9] *Vrouw Judith*, (1799) 1 C. Rob. 152; *Neptunus*, ibid., 171; the *Juno*, (1799) 2 C. Rob. 119.

In cases of egress the ship and not the cargo is confiscated when the regulations of the State whose port is blockaded do not permit a departure in ballast, and the neutral ship comes out in consequence of a rumour that hostilities are likely to break out between the belligerent and the country to which the vessel belongs.[1] Egress is lawful when the vessel is acquired by one neutral subject from another, and the acquisition has nothing to do with the commerce of the port, and the vessel comes out in ballast.[2] Egress even in ballast is unlawful when the vessel has been purchased by the neutral vendor from the enemy since the outbreak of hostilities.[3]

On principle, egress always constitutes a violation of blockade when the ingress was unlawful, as the offence, unlike that of the carriage of contraband, is not deposited with the cargo.[4]

French usage, semble, agrees with English usage, as to duration of penalty, when neutral attempts to enter, after having received special notification.

The duration of the penalty of violation of blockade is the same, according to the French doctrine, as it is according to the doctrine of Great Britain and the United States.[5] Therefore, even by the French doctrine, if the neutral vessel, after having received a regular notification of the blockade by one of the blockading squadron, actually enters the port, she is liable, after egress, to be taken *in delicto* till she reaches her port of origin. The point cannot be considered quite settled, as may be gathered from the cautious language employed by Mr. W. E. Hall. This circumstance shows the wide variance that exists between the right of blockade as exercised by Great Britain and the United States, and the right as exercised by France. Sir W. Scott observed that it would be "the most absurd application of the principle" to concede that a neutral vessel had in some degree made her escape from the penalties of violation of blockade, because she had escaped the interior circumvallation of the blockading squadron.[6]

[1] *Drie Vrienden*, (1813) 1 Dods. Rep. 269.
[2] The *Potsdam*, (1801) 4 C. Rob. 89; the *Vigilantia*, 6 C. Rob. 124.
[3] The *Vigilantia*, (1805) 6 C. Rob. 124.
[4] The *Frederic Molke*, (1798) 1 C. Rob. 86, 87.
[5] Hall, "International Law," 5th ed., 710.
[6] The *Welvaart Van Pillaw*, (1799) 2 C. Rob. 128, 129.

Finally, it may be remembered that, according to the English theory, as fully as by that adopted in France, the limitations imposed on neutral commerce by the right of blockade depend for their validity solely upon the fact that a blockade really exists at any given moment.[1]

Penalty for breach of blockade.

In the *Welvaart van Pillaw*, (1799) 2 C. Rob. 128, 130, Lord Stowell said—

"It is unnecessary for me to observe, if a ship that has broken a blockade is taken in any part of the same voyage, she is taken *in delicto*, and subject to confiscation. The offence is not terminated till she reaches the end of the voyage."[2]

The cargo may be condemned when the vessel is released,[3] in the somewhat exceptional case where the neutral vessel is permitted to enter the blockaded port owing to the remissness of the blockading squadron. An implied permission to enter, arising from remissness, protects the egress of the vessel, but not the cargo brought out, if the blockade actually existed at the time the cargo was shipped.[4] If the blockade is raised during the voyage, the liability to capture comes to an end, the existence of the offence being dependent on the existence of the state of things which gave rise to it.[5]

Penalty of breach of blockade as to the cargo.

There are more highly penal consequences for violation of blockade than for carriage of contraband,[6] and, therefore, the general rule is that, in the former case, both ship and cargo are confiscated.[7] This general rule applies (1) when the owners of the cargo are identical with the owners of the ship; (2) where the consignees have entire dominion over ship and cargo, so that the act of the master binds them;[8] (3) where

[1] Hall's "International Law," 5th ed., 705.

[2] 1 Keat's Comm., p. 152; the *Mercurius*, 1 C. Rob. 83; the *Juffrow Maria Schroeder*, 3 Rob. p. 147.

[3] *Juffrow Maria Schroeder*, (1800) 3 C. Rob. 147, 160.

[4] Cf. also Halleck's "International Law," vol. ii. p. 207.

[5] The *Lisette*, 6 C. Rob. 378; Ortolan, "Diplomatie de la Mer," ii. 354.

[6] Letters of Historicus, "International Law," p. 145.

[7] The *Comet*, Edwards' Admiralty Reports, 32.

[8] The *Columbia*, 1 C. Rob. p. 154; the *Vrouw Judith*, ibid., p. 150; the *Imina*, 3 C. Rob. 169; the *Rosalie and Betty*, 2 C. Rob. pp. 343, 351. It is curious to note that in the case of the *Bermuda*, (1865) 3 Wall. 514, the agents of the Confederate States in this country were the consignees of the entire cargo. As

the master makes a criminal deviation into a blockaded port, and assigns a frivolous pretence as an excuse, and does not assert that he deviated under particular instructions which only applied to a part of the cargo.[1] The inference from the master's action may lead to a condemnation of the cargo. Thus, if, after having been warned by a vessel of the blockading squadron, the neutral is afterwards caught steering into the bay of the blockaded port, both vessel and cargo will be condemned, even if a mistake is alleged. In such a case there is a presumption leading to the confiscation of the cargo, because it is considered that he had no inducement to act as he did without the instructions and intention of the owner of the cargo.[2]

But the owners of the cargo are not, in general cases, held to be affected by the act of the master, unless he is specially appointed their agent;[3] and the master is not the representative of the owner of the cargo to the same extent, and in the same direct manner, as he is the representative of the owner of the ship.[4]

In a case in which Lord Stowell reviewed and confirmed the principles of law applicable to this subject of the complicity of the owner of the cargo with the master of the ship, he held that the only two exceptions to the general rule that ship and cargo are both confiscated for breach of blockade are: (1) where orders are given for goods prior to the existence of a blockade, and there was not time for countermanding the shipment afterwards; (2) where there is no knowledge of the blockade till the ship sails and the master, after receiving the information, obstinately persists in going to the port of his original destination.[5]

When cargo is exempt from confiscation for breach of blockade.

Marine insurance and violation of blockade.

"In case of a war between foreign States, our courts recognize the rights of British subjects and other neutrals to carry on

has been seen, this decision was severely criticized by Mr. W. E. Hall ("International Law," p. 710). But this fact explains that portion of the judgment in the case of the *Bermuda* which related to the cargo.

[1] The *Alexander*, (1801) 4 C. Rob. 93.

[2] The *Adonis*, (1804) 5 C. Rob. 256.

[3] The *Alexander*, *supra*, p. 94.

[4] The *Adonis*, (1804) 5 C. Rob. 256, 261.

[5] The *Exchange*, Edwards' Admiralty Reports, pp. 42, 43.

their trade with a belligerent (subject to the other belligerent's right of capture). Consequently the carriage of contraband goods, or voyages in breach of blockade, are not considered illegal,[1] and it necessarily follows that insurances on such voyages are not illegal. Duer maintains (i. 755) that an insurance effected in a neutral country on a voyage to a blockaded port is illegal, and relies on *Harratt* v. *Wise*, (1829) 9 B. & C. 712; *Naylor* v. *Taylor*, (1829) 715; and *Medeiros* v. *Hill*, (1832) 8 Bing. These cases are, however, inconclusive, and cannot prevail against the later authorities."[2]

Historicus, writing before the date of the case cited in Arnould on Insurance (*supra*), doubted whether the inference deduced by Duer from the cases he cited was not unduly extended.[3] Duer's position cannot now be entertained, and it was further inadmissible for the purpose for which it was advanced. The argument from the prohibition by municipal law to prohibition by international law is invalid. This is an aspect of the question which Historicus did not argue. It may almost be said that, assuming (what cannot now be done) the truth of the argument in Duer on insurance, he seemed to concur in the inference.

But Mr. W. E. Hall observes: "It is generally unsafe to use municipal laws to define the view of international duty taken by a nation."[4]

Sir R. Phillimore observes—

"With respect to the bearing of municipal law upon international law, the language of M. Portalis, no mean authority, is applicable: 'Le droit ne naît pas des réglemens, mais les réglemens doivent naître du droit:' Case of *La Statira*, cited Merlin, Rep., t. xiii. p. 108 ('Prise Maritime')."[5]

Municipal law cannot be the source of international law.

The fact that infringement of blockade is regarded as an offence by municipal law, as it is in some countries, could never give rise to a rule of international law. It seems, on the

[1] *Ex parte* Chavasse, *In re* Grazebrook, *per* Lord Westbury, (1865) 34 L. J. Bank. 17; the *Helen*, (1865) L. R. 1 A. and E. 1; *Santissima Trinidad*, (1822) 7 Wheaton, 283; and *Richardson* v. *Maine Ins. Co.*, (1809) 6 Mass. 102.

[2] Arnould on "Marine Insurance," vol. ii. pt. ii. c. v. s. 760, p. 853 and note, ibid.

[3] Letters, "International Law," p. 144.

[4] "International Law," p. 612 and note.

[5] Ibid., vol. iii. s. 233, p. 324.

other hand, reasonable to assume that the modern tendency to minimise the duties of neutrals has prevented men from treating violation of blockade as an offence by municipal law, or, at least, as an act *contra bonos mores*, so as not to be capable of being insured against.

Carriage of contraband and violation of blockade only offences against international law when effected by neutral State itself, and not by its subject.

While Burlamaqui, Heineccius, and G. F. Martens may be quoted as authorities for the position that the act of an individual may implicate the State, neither the carriage of contraband nor the violation of blockade is such an act. It is only when such acts are done by the neutral State, and not merely by the neutral subject, that there is any infraction of international obligation.

Maritime commercial codes and violation of blockade.

The maritime codes of various countries provide regulations to be observed by their subjects when a friendly State has blockaded the ports or harbours of another.

Spanish Code.

By the Spanish Code, art. 640, a blockade of a port of destination justifies a seaman in abandoning his voyage. By art. 677 the contract of affreightment remains in force if, whilst the captain is without instructions from the shipper, a declaration of war or of blockade should be made during the voyage. In such a case the captain must make for the nearest neutral and safe port, and await orders from the shipper, and the expenses and wages during the detention will be settled as general average. By art. 690, s. (2), a blockade annuls a charter-party when it happens before the vessel sails. By art. 692 the charter-party is partially rescinded when it happens in the course of the voyage.

Portuguese Code.

The Maritime Code of Portugal provides by art. 547 that a charter-party is rescinded when the sailing of a ship for its port of destination is delayed by a blockade.

Italian Code.

By the Mercantile Marine Code of Italy, art. 616, blockade and other war risks are not on the insurer unless so expressly agreed. By arts. 551–553 seamen are entitled to wages in proportion to the term which they have served in cases of voyages made in violation of blockade and then abandoned.

Code of Holland.

By the Maritime Code of Holland, art. 370, if the port to which a ship is bound is under a blockade, a commander, unless he has other orders, must make for a neighbouring open port

of the same State. By art. 504 the outward freight only is payable when a ship has to return with cargo in consequence of blockade.

By the Maritime Code of Belgium, art. 178, insurers may take risks of war including blockade. Belgian Code.

Finally, by the Commercial Code of the German Empire, art. 848, an insurer takes war risks unless the contract is concluded with a clause free from molestation of war. And as blockade is a war risk, an insurer is not liable for blockade risks when he takes all other risks than risks of war. Commercial Code of German Empire.

Mr. W. E. Hall observes that— Pacific blockade, its origin and nature.

"Much of what appears in the older and even in some modern books upon the subject of reprisals has become antiquated. Special reprisals, or reprisals in which letters of marque are issued to the persons who have suffered at the hands of the Foreign State, are no longer made; all reprisals that are now made may be said to be general reprisals carried out solely through the ordinary authorized agents of the State, letters of marque being no longer issued." [1]

In the above passage Mr. W. E. Hall seems to consider that general reprisals are a measure of constraint short of war. Sir R. Phillimore, on the other hand, considers that general reprisals and open war are, by the practice of nations, synonymous.[2]

The last instance of special reprisals, in Sir R. Phillimore's sense, is that made by England against Greece in 1850,[3] which Mr. W. E. Hall[4] and M. Alphonse Rivier[5] treat as a pacific blockade. Hall[6] and Phillimore consider that the last instance of belligerent embargo was the seizure by Great Britain of Dutch vessels in 1803 at the Cape of Good Hope,[7] and also in the ports of this country. Special reprisals, so far as they involve issuing letters of marque, have necessarily

[1] Hall's "International Law," 5th ed., 371.
[2] "International Law," vol. iii. s. x.
[3] Ibid., p. 29.
[4] Ibid., *supra*, p. 372.
[5] "Principes de Droit des Gens," 1896, vol. ii. p. 198.
[6] "International Law," p. 369.
[7] Phillimore's "International Law," vol. iii. s. 26.

fallen into desuetude since the Declaration of Paris, 1856, and the abolition of privateering.

Analogy of Pacific blockade to special reprisals or embargo.

It seems clear, on principle, that pacific blockade is a modern mode of retorsion and reprisal by which international comity and right may be vindicated. Rivier considers that, under modern limitations, pacific blockade is merely a particular instance of special reprisals, like embargo. Halleck considers that pacific blockades are nothing but special reprisals.[1] The older forms of constraint short of war were resorted to on the failure of negotiation and arbitration,[2] and their disappearance coincides with the rise of international arbitration. Reprisals were resorted to by most of the Great Powers of Europe against each other. But pacific blockades, without any exception, have been instituted by powerful States against weak States.[3] But this fact, in turn, does not at all distinguish them in principle, and according to the fifth article of the French Ordonnance of 1681, ships and goods taken at sea under letters of reprisals were to be adjudicated upon, like prizes taken in open war, in the Courts of Admiralty. But in 1884 the French, during their pacific blockade of Formosa, constituted prize tribunals which purported to validate the seizure of neutral vessels.[4] While this fact has been justly construed as impeaching the status of a "pacific blockade," it equally shows that it is a mere modern survival, at least on the French view, of the special reprisal. It is submitted that pacific blockade offers even more affinity to what Sir R. Phillimore calls belligerent as opposed to civil, embargo. Special reprisals could be exercised on the high seas, while embargo, like pacific blockade, is a measure of restraint directed against a coast or harbour. According to the exercise by Great Britain of the right of belligerent embargo in 1803, it is difficult to draw any distinction between belligerent embargo and pacific blockade. In that instance, there being peace between the two countries,

[1] "International Law," 1893, c. xiv. p. 474.
[2] Phillimore's "International Law," vol. iii. s. 7.
[3] Despagnet's "Cours de Droit International Public," p. 519.
[4] Ibid.

Great Britain forcibly detained Dutch ships in a Dutch harbour. It is very difficult, in view of the Order in Council of May, 1806, not to regard the blockade proclaimed by the English Government in April as a pacific blockade. The restrictions imposed on the blockade of the ports of North Germany by the subsequent order show that it was not to apply to neutrals, and therefore it complies with the more desirable form of pacific blockade. As far as Prussia was concerned, this blockade seems in all respects to have been a mere pacific blockade.[1] It is usual, however, to assign a far later date to the first instance of the usage.[2]

Pacific blockade, definition of, by Prof. T. E. Holland, *Times*, March 8, 1897.

The following is the definition of pacific blockade given by Professor T. E. Holland in a letter written shortly before the notification by the Six Powers of the pacific blockade of Crete:—

"A pacific blockade is one of the various methods—generically described as "reprisals," such as "embargo," or seizure of ships on the high seas—by which, without resort to war, pressure, topographically or otherwise limited in extent, may be put upon an offending State."

In the domain of theory the subject of pacific blockade has lent itself to controversial treatment almost as discursive as the form of blockade called a paper or fictitious blockade. In the letter before mentioned, Professor T. E. Holland considered that the one controversy has become as much a dead letter as the other, since it became the practice to enforce a pacific blockade only against vessels belonging to the quasi-enemy, without involving confiscation even in this case.

Views of jurists on the legality of pacific blockade.

The views of the jurists of different countries on the subject are summarized by Mr. W. E. Hall.[3] Pistoye and Duverdy[4] and Woolsey (s. 119) deny the existence of a right to enforce pacific blockade, but their minds were fixed upon its earlier form, when it was directed against ships under all flags, and

[1] Cf. Letters of Historicus, pp. 109, 110, referring to Schoell's "Traités De la Paix," vol. ix. p. 44.

[2] Cf. M. Alphonse Rivier's "Principes de Droit des Gens," 1896, vol. ii. p. 198, and letter of Professor T. E. Holland to the *Times*, March 8, 1897

[3] "International Law," 5th ed., p. 375.

[4] "Traite des Prises Maritimes," ii. 376-8.

vessels arrested for a breach of pacific blockade were at one time confiscated, as they would be in a state of war.[1]

Heffter (s. 111), Calvo (s. 1591), and Cauchy (ii. 428) pronounce in favour of it. Bluntschli (ss. 506, 507) approves of the practice on condition that the blockade shall not be so conducted as to touch third States. Von Bulmerincq[2] unwillingly admits it as being at any rate a less evil than war. Mr. Lawrence considers that the history of the two pacific blockades of 1884 and 1886 points unmistakably to the conclusion that pacific blockade is lawful provided it is enforced against none but vessels of the Power which is to be coerced by it.[3] M. Rivier, while he seems to allow the aptitude of theoretical objections, observes that policy is a question of action, and it is hardly possible at this day to withhold from pacific blockade the character of an institution of international law.[4] General Halleck observes—

"Some writers have imagined a state of things which they term 'pacific blockade'; that is to say, that one State may

[1] During the blockade of Mexico by France in 1838, not only were Mexican ships liable to capture, but vessels belonging to third Powers were seized and brought in for condemnation. The French also proposed to confiscate neutral vessels in 1884, when they "pacifically blockaded" Formosa. Lord Granville informed M. Waddington in November, 1884 (Parl. Papers, "France," No. 1, 1885), that the contention of the French Government that "a pacific blockade" confers on the blockading Power the right to capture and condemn the ships of third nations for a breach of blockade is in conflict with well-established principles of international law. It is of great interest to note that this contention of France in the case of pacific blockade cannot claim the sanction of the famous Ordonnance de la Marine of Louis XIV. Letters of reprisal are clearly *in pari materia* with a proclamation of pacific blockade, and by the Ordonnance, art. iii., permission was only given to those to whom the letters of marque were issued to arrest and seize the goods of the subjects of the State offending (cf. Phill., "International Law," vol. iii. s. 15). The influence of the Ordonnance, on the other hand, is perhaps discernible in the constitution of prize courts by the French at their "pacific blockade" of Formosa (cf. art. 6, Ordonn. de la Marine). On the ground that pacific blockade has in fact involved the institution of prize courts, M. Frantz Despagnet objects to the usage. A prize court necessarily implies that a state of war exists (cf. Phill., "International Law," vol. iii. s. 20; and Sir W. Scott's observation in the *Hendrick and Maria*, (1799) 1 C. Rob. 146, 156, that, in cases of prize, the claimant is subject to "no other rights than those of war, and is amenable to no jurisdiction but such as belongs to those who possess the rights of war against him").

[2] Holtzendorff's Handbuch, 1889, vol. iv. s. 127.

[3] "Principles of International Law," pt. iii. c. i. p. 290, ed. 1896.

[4] "Principes de Droit des Gens."

blockade the coasts of another State, and that at the same time declare that a state of peace is maintained. The weight of authority, however, is against such an anomaly. While a blockade, as a war measure, will be internationally respected, this will not be the case with a blockade instituted as a system of pacific pressure. Such blockades cannot affect neutral States, they are virtually nothing but special reprisals."[1]

Dr. T. Walker observes—

"At present (1895), in view of the paucity of instances, the divergence in the character of the actual operations, and the disputes which arose thereon, we must be content to say that the title (of a pacific blockade) is not yet practically established."[2]

M. Frantz Despagnet, the newly-elected member of the Institute of International Law, considers the usage of "pacific blockade" as entirely indefensible. He argues that, both by treaty and by unilateral acts, blockade has been exclusively confined to a state of war; *ex. gr.*, the French governmental regulations of July 26, 1778, art. 1, the great treaties on neutrality in 1778 and 1800, and the Declaration of Paris, 1856. Other objections of M. Despagnet are, that pacific blockade (1) has been exclusively employed by powerful States against weak States; (2) places a prohibition on neutral commerce, while it leaves the subjects of the blockading State free to trade with those of the blockaded State—this he considers an inversion of the legitimate operation of blockade; (3) does not possess the effect claimed for it of preventing war; *ex. gr.*, the case of Turkey in 1827, that of Mexico in 1838, that of 1885 with China. To these instances must now be added the case of Crete in 1897.[3]

Proposals of the Institute of International Law to regulate pacific blockade.

It remains to notice the proposals of the Institute of International Law. During its session at Heidelberg in 1887, the following resolutions were voted:—

(1) Vessels under a foreign flag may freely enter in spite of a pacific blockade.

[1] "International Law," 1893, c. xiv. p. 474.
[2] "Manual of Public International Law," 1895, p. 97.
[3] "Cours de Droit International Public," p. 519.

(2) A pacific blockade must be officially declared and notified, and must be maintained by a sufficient force.

(3) Vessels of the blockaded Power which do not respect such a blockade may be sequestrated. The blockade having ceased, they must be returned to their owners, but without compensation of any kind.

History of the usage of pacific blockade.

The following history of the usage is given in Rivier:—

"One may cite as the first pacific blockade that of 1827; the combined fleets of England, France, and Russia blockaded the Turkish coasts. In 1831 France blockaded several points of the Portuguese coast. In 1833 France and England blockaded the ports of Holland. New Granada was blockaded by England in 1836, Mexico by France in 1838, and La Plata from 1838 to 1846 by France; and from 1845 to 1848 it was blockaded by both France and England. In 1850 England blockaded, as a measure of reprisal, the Piraeus and the other ports of Greece.[1] Sardinia blockaded Messina and Gaeta in 1860. England blockaded Rio Janeiro in 1862. The Great Powers threatened to blockade the Turkish coast in 1880 by anchoring their fleet in Dulcigno. France blockaded the ports and roadsteads of Formosa in 1884. The Great Powers, with the exception of France, blockaded in 1886 the coasts of Greece, but only detained Greek vessels. In November, 1888, Germany and Great Britain, in order to put an end to the treaty and to the violence and depredations of the slave dealers, blockaded Zanzibar; but this blockade was not even directed against Zanzibar—it had rather the character of a measure of maritime police directed against the slave traffic."[2]

In 1895 Rear-Admiral Stephenson maintained, for some

[1] A full account of this last blockade is given in Phillimore's "International Law," vol. iii. s. 23. Sir R. Phillimore does not, however, treat the Don Pacifico incident as involving a pacific blockade, but discusses it as an instance of special reprisal. He considers that the international jurist is bound to say that the evidence at present produced does not appear to be of that overwhelming character which alone could warrant an exception from the well-known and valuable rule of international law that recourse should not be had to reprisals until the subject of the offended State has exhausted those legal remedies which it must be presumed are afforded by the ordinary legal tribunals of every civilized State. It was an admitted fact that M. Pacifico had not applied to the Greek Courts of Law for redress. Sir R. Phillimore's judgment seems wholly unfavourable to the action of the British Government, and he seems to quote with some commendation the protest of Russia, couched in terms of menace that it is difficult not to attribute significance to in connection with the outbreak of the Crimean War four years later. The Don Pacifico incident is treated by Mr. W. E. Hall, as well as M. Rivier, as a case of pacific blockade ("International Law," 5th ed., 372).

[2] "Principes des Droits des Gens," 1896, vol. ii. p. 198.

weeks, a pacific blockade against the port of Corinto, Nicaragua. In 1897 the Concert of Europe, represented by fleets of Great Britain, Austria, Germany, France, Italy, and Russia, blockaded the Island of Crete, where an armed insurrection was raging, and where a detachment of Greek regular troops had landed. By the blockade notification[1] the blockade was only declared general for ships under the Greek flag. But it cannot be said that this blockade was directly only against the ships of the quasi-enemy, as it appears from the notification that the vessels of neutral Powers were liable to be visited and, apparently, detained under certain circumstances. The notification did not provide any time for ships to leave; but Greek war vessels were given forty-eight hours. The blockade lasted till December 1, 1898, when Prince George of Greece was appointed High Commissioner. It may be worth while to add that in February, 1897, Germany originally proposed to blockade pacifically the Greek ports, but England and Italy objected. In April, 1898, Germany and Austria withdrew from the pacific blockade of Crete. The application of the term "pacific" to this blockade is an entire misnomer. The region round Canea was continually bombarded by the fleets of the Powers,[2] and Admiral Noel bombarded Candia in September, 1898.[3]

During the Graeco-Turkish War of 1897 the Greek Government notified a belligerent blockade of the coast of Epirus and a portion of the littoral of the Gulf of Salonica. It claimed as far as the last is concerned that the blockade should extend to five miles from the coast. No time was fixed for the departure

[1] *London Gazette*, March 19, 1897.

[2] "Ann. Reg.," 1897, p. 319.

[3] The present recrudescence (April, 1905) of the demand of Crete for federation with Greece seems of considerable interest at this moment, and was clearly the exciting cause of the blockade of 1897-8. In 1901 the Cretan assembly passed a resolution in favour of union with Greece. The four protecting Powers issued an "identic declaration," stating that they did not consider this advisable ("Ann. Reg.," 1901, 305). Crete occupies the truly abnormal position of a mi-Souverain State, which is under "the protection" of four Powers, and the suzerainty of a fifth. The only analogy appears to have been the status of Cracow and Luxembourg. The international status of Crete is, however, far more complex owing to the suzerainty of the Sultan. A Protectorate is generally recognized as contrasting with a State under suzerainty.

of any neutral vessel in any port. This blockade was extended to the Gulf of Volo a few days later. It appears from the notification that the Greek Government held that capture could only be effected on the spot itself.[1] On the other hand, there was no stipulation as to the notification *spéciale*, and therefore the Greek usage apparently conforms to English and American usage.[2]

In 1902 Great Britain, Germany, and Italy pacifically blockaded Venezuelan ports.[3] But this so-called pacific blockade was certainly not confined to the interception of the vessels of the quasi-enemy, as the notification merely stated that "vessels which attempt to violate the blockade will render themselves liable to all measures authorized by the law of nations and the respective treaties, etc."

Germany and Italy issued separate notifications, but it is equally clear that in both cases the vessels of neutral Powers were amenable to the operation of blockade.[4] This blockade equally involved a conflict of warships, and therefore is miscalled pacific. The seizure of Venezuelan gunboats by British and German cruisers, the German commander later sinking one of them, caused a ferment in the United States.[5] In the case of a belligerent blockade by notification, "it is to be presumed that the notification would be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up."[6] At the close of 1898 a notification was issued declaring the blockade of Crete raised, and in 1903 Italy, England, and Germany issued separate notifications declaring the blockade of the Venezuelan ports raised. In

[1] This is the limitation adopted by the proposed Règlement des Prises Maritimes of the Inst. de Droit Int., ss. 35–44.

[2] *London Gazette*, 1897, 2751.

[3] In view of the fact that this blockade involved a distinct reversion to what is universally considered the older and objectionable form of pacific blockade, it is clearly necessary to remember that three Powers concurred in enforcing it. In the "Annual Register," and the last edition of Mr. W. E. Hall's "International Law," no mention is made of Italy as one of the blockading Powers. But for the Italian notification, cf. *London Gazette*, December 23, 1902, p. 8839; and *q.v. Times*, December 22, for the active part played by the Italian cruiser *Giovanni Bausan* in enforcing the blockade.

[4] *London Gazette*, December 23, 1902.

[5] "Ann. Reg.," 436.

[6] *Per* Sir W. Scott in the *Neptunus*, (1799) 2 C. Rob. 110, 114.

this respect the usage of the last two pacific blockades has conformed to the belligerent usage. Though the blockade was made applicable to all nationalities, there does not appear to have been any seizure of vessels not flying the Venezuelan flag. The blockade of 1902 was also rendered effective from the day of publication (December 20), but fifteen days of grace were allowed for vessels "lying in ports now declared to be blockaded," and varying periods were granted to steamers and sailing vessels which had left harbour prior to notification.

The usage of pacific blockade has changed for the worse since 1897.

It is therefore necessary to conclude that from 1897 the practice of pacific blockade has again changed for the worse, as it has once more reverted to the imposition of obligation upon neutrals, even to the extent of confiscating their vessels for violation of the blockade. It has, therefore again become open to all the objections that were originally aimed against it. As practised in 1897 and 1902, the usage cannot derive any support from the limited approval conceded by Professor T. E. Holland and Dr. T. J. Lawrence. Both in 1897 and 1902 pacific blockade involved belligerent operations, and these, in some instances, seem to have exceeded the due exercise of belligerent rights in the conduct of blockade as an operation of war. The sinking of a Greek merchant vessel, alleged to be carrying provisions and stores to the insurgents, by the Austria cruiser *Sebenico* may be instanced during the blockade of 1897. Perhaps this may be dismissed as an episode, however regrettable, which was not, strictly speaking, an incident of the blockade, as it occurred before the proclamation. Moreover, the insurgents seem to have first fired on the *Sebenico*. But after the proclamation an English cruiser sank two caiques, carrying munitions of war to the insurgents.

Policy of France to assimilate pacific blockades to the belligerent right.

Great Britain seems to have acceded to this view since 1902.

France has always leaned to an assimilation of pacific blockades to those practised by belligerents, and, judging from the usage as exercised in 1902, England has finally acceded to this view. The only possible difference between the French usage of belligerent and pacific blockade is presumably that vessels cannot be seized on the high seas for attempted violation of pacific blockade. But this does not seem very certain.

Controversial future of pacific blockade.

The fact that two great maritime nations have asserted the right of instituting a blockade, with all the incidents of war in time of peace, suggests possibilities of future conflict. It cannot be supposed that the strict usage of pacific blockade will be persisted in. Neutral nations cannot be expected lightly to endure, in time of peace, an operation which has always been described as the most onerous that can be inflicted on neutrals in time of war.

Possibility of offences against international comity would not be abolished by abolition of pacific blockade.

Tendency of international disputes to take a commercial form in modern times.

On the other hand, it must not be forgotten that the occasion of pacific blockade would not disappear with its abandonment. An offence against the comity of nations may take the form of a purely commercial difficulty, as that between Great Britain and the Two Sicilies in 1840. In the present state of the world it cannot be said there is no possibility of conflict on questions of international commerce and finance. There will always remain the possibility that occasions may arise when nations will proceed to retortion or reprisal. But in the present state of the usage pacific blockade appears as two-handed a weapon as the abolished form of reprisal, privateering.

APPENDIX A.

Professor T. E. Holland's Letter to the "Times," November 29, 1904, on the British Proclamation of Neutrality.

In a letter of general interest which Professor T. E. Holland recently addressed to the *Times*,[1] he expressed the same approval that Historicus bestowed in 1863 on the language of the British Declaration of Neutrality promulgated in 1861, declaring that every person engaging in the carriage of contraband "will be justly liable to hostile capture and to the penalties denounced by the law of nations in that behalf, and will in no wise obtain protection from us against such capture or such penalties." But Historicus[2] drew an opposed inference, at all events on one occasion, from this language to that recently derived from it by Professor T. E. Holland. Historicus concluded that, in the very terms of Bynkershoek, "Non recte vehamus, sine fraude vendimus," the Declaration of Neutrality issued in 1861, of which that issued in 1904 is a literal transcript, prohibited as unlawful the transport of contraband, while it obviously left untouched the traffic in contraband on the neutral territory. But Professor Holland observed in the letter referred to, that he was especially desirous "of emphasizing the proposition that carriage of contraband is no offence, either against international law or against the law of England."

Qualified approval of Prof. T. E. Holland of language of Proclamation of Neutrality.

Carriage of contraband not an offence by international law: Prof. T. E. Holland. Lord Bramwell to same effect.

In *Attorney-General* v. *Sillem*, (1883) 2 H. & C. 431, 540, Lord Bramwell (then Bramwell, B.) observed that, "There is no international law forbidding the supply of contraband of war."

While Professor T. E. Holland considers that international law neither prohibits the conveyance of contraband nor, *à fortiori*, the sale of contraband on neutral territory, Vattel and Historicus appear indecisive, and Sir R. Phillimore and foreign jurists, not all of whom are advocates of the Armed Neutrality, consider that both the transport and traffic are prohibited by international

Indecisive nature of appeal to authority on point.

[1] November 29, 1904.

[2] Letters, "International Law," p. 132.

law as illegal. An American writer, Duer, who, as Historicus conceded, was no more open to the imputation of having derived his view on international law from speculation, like Galiani and Hautefeuille, than Sir R. Phillimore, clearly considers that the carriage of contraband is prohibited by, and is therefore illegal by, international law. Duer[1] seems to arrive at the conclusion that the carriage of contraband is unlawful by international law in the light of his sustained criticism of Vattel.

Vattel's position, analysis of, by Duer.

Vattel implicitly[2] and explicitly derives the right of the belligerent to intercept contraband *in transitu*, the ultimate postulate of the whole topic, from "the care of his own safety," from "the necessity of self-defence." Duer infers from the account Vattel gives of the belligerent right that the carriage of contraband must be an act of positive, though indirect, hostility, and therefore an infraction of neutrality, necessitating a conclusion to its prohibition by international law. Vattel defines contraband in the following terms:—

Vattel's definition of contraband.

"Commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for shipbuilding, every kind of naval stores, horses—and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine."[3]

Carriage of contraband an offence against international law.

In this definition of contraband, Vattel clearly considers the carriage of contraband illegal by international law, since he speaks of it as prohibited.

But in a previous passage in Vattel, which was relied on by Mr. Justice Story, in the *Santissima Trinidad*, 7 Wheaton's Reports, p. 340, and by Historicus—though with some hesitation—the great Swiss authority on the law of nations seems no less decisively to take the view that the carriage of contraband is not prohibited by international law. Vattel there says—

Vattel's language indecisive on point.

"When I have notified to them my declaration against such or such a nation, if they will afterwards expose themselves to risk in supplying her with things which serve to carry on war, they will have no reason to complain if their goods fall into my possession; and I, on the other hand, do not declare war against them for having attempted to convey such goods. They suffer, indeed, by a war in which they have no concern; but they suffer accidentally. I do not oppose their right: I only exert my own; and if our rights clash with and reciprocally injure each other, that circumstance is the effect of absolute necessity. Such collisions daily happen in war. When, in pursuance of my rights,

[1] "Marine Insurance," vol. i. p. 750.
[2] "Droit des Gens," l. iii. c. vii. s. 112.
[3] Ibid., l. iii. c. vii. s. 112.

I exhaust a country from which you derive your subsistence; when I besiege a city with which you carried on a profitable trade I doubtless injure;—I subject you to losses and inconveniences, but it is without any design of hurting you. I only make use of my own rights, and consequently do you no injustice. But that limits may be set to these inconveniences, and that the commerce of neutral nations may subsist in as great a degree of freedom as is consistent with the laws of war, there are certain rules to be observed on which Europe seems generally to be agreed."[1]

He then draws the fundamental distinction between ordinary goods and contraband goods. Duer criticizes Vattel's explanation of belligerent jurisdiction over contraband as a conflict of rights in the light of an observation of Lord Stowell, that there are no conflicting rights between nations at peace. Vattel's hypothesis, Duer contends, is completely refuted by this dictum of Lord Stowell. It is in fact difficult to deny that the account Vattel gives of the subject is inconsistent and self-contradictory. The theory of a conflict of rights cannot coexist with the assumption—explicitly taken by the Swiss author—that the carriage of contraband is prohibited by international law.

It is therefore clear that the exercise of the belligerent right to intercept contraband *in transitu* derives its origin from a mutual compromise—the neutral State abandons its subject who conveys contraband to the penalties of the law of nations in return for forbearance by the belligerent State to make the act of the neutral subject a *casus belli*. Professor T. E. Holland observes—

Reconciliation of conflicting views by Prof. T. E. Holland.

"The rule of international law upon the subject may, I think, be expressed as follows: 'A belligerent is entitled to capture a neutral ship engaged in carrying contraband of war to his enemy, to confiscate the contraband cargo, and, indeed, in some cases, to confiscate the ship also without thereby giving to the Power to whose subjects the property in question belongs any ground for complaint.' Or, to vary the phrase, 'A neutral Power is bound to acquiesce in losses inflicted by a belligerent upon such of its subjects as are engaged in adding to the military resources of the enemy of that belligerent.' This is the rule to which the nations have consented, as a compromise between the rights of the neutral State, that its subjects should carry on their trade without interruption, and the right of the belligerent State to prevent that trade from bringing an accession of strength to his enemy. International law here, as always, deals with relations between States, and has nothing to do with the contraband trader, except in so far as it deprives him of the protection of his Government. If authority were needed for what is here advanced, it might be found in Mr. Justice Story's judgment in the *Santissima Trinidad*,

[1] "Droit des Gens," l. iii. c. vii. s. 111.

in President Pierce's message of 1854, and in the statement by the French Government in 1898, with reference to the case of the *Fram*, 'That the neutral State is not required to prevent the sending of arms and ammunitions by its subjects.'[1]

"Neither," proceeds Professor T. E. Holland, "is the carriage of contraband any offence against the law of England, as may be learned by any one who is in doubt as to the statement from the lucid language of Lord Westbury in *ex parte* Chavasse.[2]

After pointing out that the conveyance of contraband was not prohibited by international law, and quoting a passage from Mr. Justice Story's judgment in the *Santissima Trinidad*, Lord Westbury said—

Lord Westbury considered conveyance of contraband neither an offence by international law nor by law of England.

"I take this passage to be a very correct representation of the present state of the law of England also. For if a British shipbuilder builds a vessel of war in an English port, and arms or equips her for war *bonâ fide* on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent Power, he may lawfully, if acting *bonâ fide*, send the ship, so armed and equipped, for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act. It is true that under the provisions of the Act of the 16 & 17 Vict. c. 107, her Majesty has power by proclamation or Order in Council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no Order in Council or proclamation was made in the terms or under the special authority of this statute."[3]

Sir R. Phillimore considered conveyance of contraband an offence by international law.

In a case arising out of the events of the Franco-Prussian War, Sir R. Phillimore observed—

"The carrier of contraband may violate the proclamation of the neutral State of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who has the right of capture. The offence is not cognizable by the municipal law of this country."[4]

Sir R. Phillimore, therefore, considered the conveyance of contraband to be an offence by international law. The Customs Consolidation Act, 16 & 17 Vict. c. 107, s. 150, to which Lord Westbury referred in *Ex parte* Chavasse, was repealed by the Customs Consolidation Act, 1876; cf. schedule. But by the Customs and Inland Revenue Act, 1879,[5] pt. 1, s. 8, the following goods

[1] *Times*, November 29, 1904.
[2] 34 L. J. Bk. 17.
[3] *Ex parte* Chavasse, *In re* Grazebrooke, (1865) 34 L. J. N. S. 17, 20.
[4] The International, (1871) 3 A. & E. 321, 336.
[5] Stat. 42 & 43 Vict. c. 21.

may by proclamation or Order in Council be prohibited either to be exported or carried coastwise: "Arms, ammunition, and gunpowder, military and naval stores, and any articles which her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food for man; and if any goods so prohibited shall be exported or brought to any quay or other place to be shipped for exportation from the United Kingdom or carried coastwise, or be waterborne to be so exported or carried, they shall be forfeited, and the exporter or his agent, or the shipper of any such goods, shall be liable to the penalty of one hundred pounds."

Exportation of either absolute or conditional contraband may be prohibited by Order in Council under Customs and Revenue Act, 1879.

Although, therefore, the carriage of contraband is not normally prohibited by municipal law in this country, the power to issue a prohibition, not merely against the carriage of articles which are absolutely contraband, but even against the conveyance of provisions and other articles *ancipitis usus*, is conferred by the above provision. When this power is exercised by virtue of a statutory provision, or otherwise, the municipal law of this country will take cognizance of the conveyance of contraband. But it appears from the remarks of Lord Westbury, in the case above referred to, that the proclamation which is required to set the Customs and Inland Revenue Act, 1879, pt. 1, s. 8, in operation is not the regular and normal Declaration of Neutrality issued by the British Government at the commencement of a war between foreign States. A perusal of the several letters Historicus wrote on the subject of contraband of war seems, on the whole, to justify the conclusion that he cannot be included among those writers who, like Professor T. E. Holland, affirm that the carriage of contraband is not an offence against international law. The indecisive attitude which he assumed on the point was in the main due to the fact that in 1863 the validity or invalidity of insurance on a contraband voyage had never been specifically decided in an English court of justice.

Question whether Historicus can be cited as concluding carriage of contraband is not an offence.

It is now, however, clear that the point has been decided in the affirmative.[1] The action of *Ruys* v. *Royal Exchange Assurance Corporation* was brought to recover for a total loss of the steamship *Doeljwk* by capture on a valued policy covering war

By law of England policy on a contraband venture now valid.

[1] The following may give some idea of the difference between the view that was formerly entertained and the present view on this subject. Sir James Allan Park considered insurances upon contraband transactions necessarily void (Park on "Mar. Ins." (1842), 531, 548). Mr. Justice Story held underwriters were not liable unless object of voyage disclosed. Arnould observes that "the carriage of contraband goods, or voyages in breach of blockade, are not considered illegal (by municipal law), and it necessarily follows that insurances on such goods or voyages are not illegal" ("Marine Ins.," vol. ii. s. 760, ed. 1901).

risks. The steamer, which was carrying a cargo of arms and ammunition destined for the King of Abyssinia, who was then at war with the Italian Government, was captured by an Italian cruiser on August 8, 1896. After the commencement of the action the vessel was condemned by a prize court at Rome, but she was restored before trial in April next year on the ground that the war was over. The court held the defendants liable on the ground that the rights of the parties are ascertained in the actions as at the date of the writ.[1] It is curious to note that a perusal of the long line of authorities cited by Collins, M.R. (then Collins, J.), fully warrants the conclusion of Historicus, that no case had decided the validity of a policy of insurance in contraband goods in this country. But the important and very learned decision of the Master of the Rolls in *Ruys* v. *Royal Exchange*, etc., has finally set the question at rest, and has established the validity of a policy of insurance on a contraband transaction. Another and no less important consequence of the affair of the *Doeljck* is that it has permanently the doctrine of continuous voyage grafted on the law of contraband. It has, however, been seen, from the remarks of Sir W. Grant, M.R., in the case of the *William*, (1806) 5 Rob. 385, 405, referring to the case of the *Eagle*, that there exists some ground for supposing that the doctrine of continuous voyage was never considered inapplicable to the law of contraband, in spite of the statements in Hall[2] and Boyd's Wheaton[3] to the contrary.

Mr. W. E. Hall indecisive on the topic.

From the point of view of international law it is material to recollect that the late Mr. W. E. Hall, differing from Professor T. E. Holland, speaks of "the offence of transporting contraband goods."[4]

But Mr. W. E. Hall also employs an argument which suggests the other view. He twice insists on the doctrine that contraband goods are seized by a belligerent because of their noxious qualities, because of their nature, and not from the fact of transport or the act of the person carrying them. But this is to conclude in so many words that the carriage of contraband is not an offence by international law. An offence implies the commission of an act by an intelligent person. Inanimate commodities cannot commit offences or incur penalties. Again, since Mr. W. E. Hall considers that contraband goods are not seized because of the act of the person conveying them, it is clear that the latter does not incur a penalty because he is doing any wrong.

Mr. Hall also speaks of the right of the belligerent to intercept

[1] *Times*, June 1, 1897.

[2] "International Law," 4th ed., pp. 694, 695 and note.

[3] Ibid., 4th ed., p. 685.

[4] Ibid., 4th ed., pt. iv. c. v. p. 694; 5th ed., p. 668.

contraband as "a privilege." It is hardly consonant with the normal use of language to describe the right of an injured person to exact reparation as a privilege. If the belligerent's right to intercept is a privilege, the conveyance of contraband cannot be considered as an offence by international law. The criticism passed by Professor T. E. Holland on the language of the Proclamation of Neutrality, that persons engaging in contraband trade incur the high displeasure of the sovereign, recalls a criticism passed in the House of Lords in the seventeenth century on the definition of a pirate as *hostis humani generis.* The question was whether ships, to which James II., after his expulsion both from England and Ireland, had granted letters of marque, were pirates or privateers. Some lawyers with Jacobite sympathies, having argued that such vessels could not be pirates, because a pirate was *hostis humanis generis*, it was objected to by one of the lords, who had sent for the civilians, that, if that were so, no one could ever have been a pirate. In the same way it might be asked, if a subject who conveys contraband to a belligerent is one who incurs "the high displeasure" of the neutral sovereign, whether, in fact, such a penalty had ever been incurred.

As far as the municipal law of this country is concerned, the offence of conveying contraband is unknown. But it is quite another thing to assert that the conveyance of contraband is no offence by international law. This conclusion seems to differ little, if at all, from that of Hübner, who considered that nothing could be contraband if the neutral State supplied both belligerents impartially. But Professor Despagnet of Bordeaux holds as clearly as Professor T. E. Holland that the carriage of contraband is not an offence against international law. The former observes, "La saisie de la contrebande de guerre étant une mesure de protection de la part des Etats belligérants et non la punition d'un delit." [1]

Historicus and Prof. T. E. Holland on language of Proclamation of Neutrality.

In connection with Professor T. E. Holland's expression that the phrases of the Proclamation of Neutrality are of the nature of "misleading rhetoric," [2] it is interesting to recall Historicus' observation that if international law prohibited the sale of contraband on neutral territory, the Queen's proclamation was "a most mischievous fraud on her Majesty's subjects," because it merely stated that the conveyance of contraband was prohibited by international law.[3] But as Historicus totally differed from Hautefeuille and Sir R. Phillimore on this point, he clearly did

[1] Cf. "Cours de Droit International Public," 2e red., p. 713.

[2] *Times*, November 29, 1904.

[3] Letters, "International Law," "On Neutral Trade in Contraband of War," p. 131.

not consider the Neutrality Proclamation a most mischievous fraud. On the contrary, in this passage Historicus spoke of the language of the Proclamation of Neutrality in terms of commendation, all the more remarkable as the identical phrases have incurred the disapprobation of Professor T. E. Holland. Sir W. V. Harcourt observed—

"The men who drew up this document knew what the law of nations was. Who does not see at a glance that the doctrine of the duty of neutrals and the responsibility of neutral governments is precisely that which is laid down in the authorities to which I have referred? What her Majesty's subjects are warned against is the carrying of contraband to the belligerent, not the trade in contraband within their own territory. It is precisely the definition of Bynkershoek, 'Non recte vehamus, sine fraude vendimus.' It is the transportation and not the traffic which is unlawful. The nature of the penalty is pointed out with equal clearness and correctness, viz. the withdrawal of the Queen's protection from the contraband on its road to the enemy, and an abandonment of the subject to the operation of belligerent rights."[1]

[1] Letters, "International Law," "On Neutral Trade in Contraband of War,' p. 132.

APPENDIX B.

The Case of the "Caroline," the "Alabama," "Florida" (or "Oreto"), "Alexandra," and the "Caroline" (1837).

According to the Press it has been decided to institute proceedings under the Foreign Enlistment Act against certain persons concerned in the despatch of the torpedo destroyer *Caroline* from a shipbuilding yard in the Thames to Libau. It would be indiscreet to draw any inferences as to the result of proceedings which may be taken. With the exception, therefore, of a slight reference to the letter of Messrs. Yarrow, the builders of the *Caroline*, which appeared in the columns of the *Times*, December 3, it is only here proposed to make some reference to the departure of the confederate cruisers from the Mersey derived from a contemporary account in the *Times*, and to the case of the *Caroline* (1837).

Sir R. Phillimore thus briefly describes the earlier case of the *Caroline* (1837)—

"During the disturbances in Upper Canada, in the winter of 1837, a steamboat called the *Caroline*, belonging to an American owner, had been actively engaged in conveying arms and stores from the American side of the river to the Canadian rebels, who were in possession of Navy Island, and had been boarded in the night-time by a party of Canadian loyalists while she was lying within the jurisdiction of the territory of New York, set on fire, sent down the stream, precipitated over the Falls of Niagara, and dashed to pieces."[1]

Other developments of this case have been discussed. The destruction of the *Caroline* exhibits a very close parallel to the destruction of the *Florida* in Bahia harbours by the Federal warship *Wachussett*. Further, the well-known circumstance that the *Florida* and *Alabama* were called pirates finds a precedent in the language of Mr. Fox, the British Ambassador at Washington

[1] Phillimore's "International Law," vol. iii. s. 38, p. 50

in 1837, who described the *Caroline* to the American Minister of Foreign Affairs as a piratical vessel. Both in the case of the *Caroline* of 1837, and the *Florida* in 1864, a vessel engaged in operations of rebels was destroyed in the territorial waters of a neutral State. But Sir R. Phillimore shows that the United States were considerably in fault in the case of the *Caroline*. The British Ambassador complained that not only were the authorities at New York unable to maintain jurisdiction at the point where the *Caroline* was attacked, but even that they had allowed her crew to carry off cannon belonging to the State, with the object of employing it against the forces of the Queen in Canada. Although at the time the Neutrality Act of 1818 was in force in the United States, a piece of legislation panegyrized by Mr. Canning, no proceedings under it appear to have been instituted against those who dispatched and fitted out the vessel. There can be no doubt that the circumstances attending it constituted a gross infraction of neutrality, only to be rivalled by the Jameson Raid of 1895–96. Sir R. Phillimore deduces from the affair of the *Caroline* the rather startling conclusion that States organized under the Federal system are incompetent to discharge international obligations.

The circumstances attending the despatch of the famous *Alabama* are as follows. In a speech delivered by the late Earl of Selborne when Solicitor-General in the House of Commons he stated—

"On the 1st of July the Commissioners of Customs made their report to Lord Russell [about the *Alabama*]. They said it was evident that the ship was a ship of war. It was believed, and not denied, that she was built for a foreign Government; but the builders would give no information about her destination, and the Commissioners had no other reliable source of information on that point."[1]

Inasmuch as the seizure of the *Oreto* was due to the representations of the American Ambassador, it is interesting to recall the fact that one Granatelli was tried on the 5th of July, 1849, at the Central Criminal Court, before Coltman, J., for fitting out in this country ships of war to be employed against the Government of the King of Naples in Sicily. The defendant was acquitted. The case is not reported, but was mentioned by Pollock, C.B., during the voluminous and lengthy argument in *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 464.

The *Alexandra*, the vessel in question in the latter case, which came before the courts during the American Civil War, was released after having been seized by an officer of Customs in Liverpool at the Toxteth Dock on the 5th of April. Sir J. F. Stephen

[1] Hansard's "Parliamentary Debates," vol. clxx. p. 50.

observes of this trial that a mass of international law supposed to be connected with the Foreign Enlistment Act, 1819, was discussed at it. The ground of the release of this vessel was that an incomplete equipment did not come within the Act. It seems, further, to have been considered that an unarmed vessel was merely contraband, and nothing more, and that as there was no international law prohibiting the supply of contraband, there was no infraction of neutrality committed in building the vessel. The commander of her Majesty's ship *Majestic*, stationed at Liverpool, stated that the *Alexandra* was certainly not intended for mercantile purposes; that she might be used as a yacht, and was easily convertible into a man-of-war.

Even after the revolution that has taken place in shipbuilding during the last forty years, the same doubt may exist whether a vessel under construction is intended for warlike or pleasure purposes. Warships disguised as yachts appear to afford the only instance where an article can be *ancipitis usus*, the alternative use to the belligerent use being luxury. As a general rule articles of pleasure are universally excepted from the taint of contraband, this being one of the few certain data in the question of contraband. But a yacht, easily convertible into a man-of-war, which was forty years ago regarded as merely contraband, may now be treated, in the light of the Geneva Award and legislation on the subject of Foreign Enlistment, as an article whose construction or despatch gives rise to international consequences in time of war. It is interesting to recall as an instance of Mr. Canning's prescience, that he extended the doctrine prohibiting the despatch or equipment of vessels in neutral ports intended for belligerent use to steam yachts and vessels which might be afterwards converted into men-of-war.[1] It is not usual to cite as an instance of Mr. Canning's statesmanship an anticipation of the grave consequences to this country which arose out of the troubled events of the American Civil War by the depredations of confederate cruisers. Yet as they were all vessels answering the description of steam yachts, his views on this subject may fairly be said to rival in foresight his confidence in the future of the Union.

It is further of interest to note the signal efficacy of the presumption as to evidence in the case of an illegal ship introduced by section 9 of the Foreign Enlistment Act, 1870. In 1863, when no such onus was incumbent on the shipbuilder, the executive could obtain no information as to the destination of a ship under construction. This is made conclusive by the

[1] Cf. *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 466, and note referring to Mr. Huskisson's speeches, vol. iii. p. 559.

excerpts from the Parliamentary Papers given in the report of *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 466, 467. The Commissioners of Customs in Liverpool had no information either in the case of the *Alabama*, *Florida*, or *Alexandra* to give to Lord Russell which might throw any light on the destination of the vessels. How totally different a state of affairs now exists can be inferred from the leading article in the *Times* on the letter of Messrs. Yarrow that appeared in its columns, December 3, 1904. Apparently the executive were notified on no less than four separate dates of all the circumstances attending the sale and despatch of the *Caroline*. (Ibid.) It is satisfactory to conclude that the effect of the enhanced stringency of legislation on the subject of Foreign Enlistment is indirectly to relieve the shipbuilder, whose trade is embarrassed, of any liability to either forfeiture or other proceedings under the Act of 1870. By giving notice he rids himself of liability.

APPENDIX C.

The Case of the "Caroline," International Law, the Foreign Enlistment Act, 1870, *and the "Alabama."*

With reference to the alleged purchase of a British torpedo boat, disguised as a yacht, from a shipbuilding yard in the Thames, the following contemporary account of the despatch of the *Alabama* in July, 1862, from the Mersey, may be of some interest. The account appeared in the *Liverpool Daily Post*, and was transcribed into the *Times*, January 15, 1863 :—

"On the 29th of July last the '290' (as the *Alabama* was at first called), with a party of ladies and gentlemen on board, left her anchorage, and spent the day, till 3 p.m., in cruising about the bay of Liverpool, when the passengers were put on board the tender, and the vessel proceeded to Moelfra Bay, close to where the *Royal Charter* was lost, where she anchored about 8 p.m. The next day she spent in securing everything for sea. A tug arrived at 5 p.m. with a lot of men to complete the crew, and from that time till 2.30 a.m. of Thursday (July 31) was occupied in shipping the crew. As soon as this was completed the '290' steamed off, at the rate of fourteen knots an hour, round the north coast of Ireland, arriving at her destination, Porto Praya Bay, Terceira, on Sunday, August 10, making a voyage of ten days. The commander of the '290' was Captain Mathew J. Butcher, R.N.R., who was the only person who appeared in any of the ship's business to others than the builders. Again, it is said the '290' had a set of English papers and other presumptive proofs of her neutrality, in the face of which it might have been difficult for a captor to have acted. So far is this from being a fact, the '290' had no papers whatever, having left without the formality of clearing at the Customs. . . . This celebrated vessel will give a good account of herself if she is overhauled by any of the United States ships of war. She has proved herself, whether under sail or steam, a marvel of marine architecture; but that is only what one would expect to find from the fame so justly achieved by her builders. One of the pluckiest things ever done was the removal of the *Ariel's* valve, thus rendering the ship entirely at the mercy of her captor. We may state that the

Ariel was built by Commodore Vanderbilt as a yacht, and in her he came over to England, and subsequently visited Russia. She is a sister ship to the *Vanderbilt*, and the two were considered the fastest steamers in the United States mercantile marine. The ruse with which the *Ariel* was overhauled shows that the *Alabama* is a splendid craft. We ought to state that the officers and crew of this famous warship are not, as has been represented, the scum of the earth. The officers are, many of them, accomplished gentlemen, and from previous experience well up to their work as naval officers, while the crew consist for the most part of old man-of-war's men and men who have served in the Royal Naval Reserve. The *Alabama* is supplied with coal by a regular relay of ships, which take out under inspection the very best Welsh coal."

Many of the circumstances attending the departure of the *Alabama* reproduced themselves recently, assuming the accuracy of the account in the *Times*, November 22, 26, 1904. The *Caroline* left the Thames, as the *Alabama* left the Mersey, disguised as a pleasure-boat, and presumably, like the *Alabama*, without papers. The circumstance that at noon, October 6, the *Caroline* started down the Thames at twenty-two knots, followed forty minutes later by a river police boat, may be compared to an incident occurring at the departure of the famous *Florida* from the Mersey in March, 1862. Mr. Adams made representations, at a private interview with Lord Russell, March 22, 1862, the very day the *Florida* sailed, which might have led to her detention in the Mersey if she had not already cleared. Again, the *Caroline*, like the *Alabama*, was unarmed when she departed from the shores of this country, and had neither received her fighting crew nor commission.

Even if the facts are correctly stated by the *Times*, it is far from clear that there has been any offence against international law. Mr. W. E. Hall, after pointing out that the usage on the subject is only in course of growth, observes—

"That in the meantime a ship of war may be built and armed to the order of a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or it may be delivered to him within such territory, and may issue as belligerent property, if it is neither commissioned nor so manned as to be able to commit immediate hostilities, and if there is not good reason to believe that an intention exists of making such fraudulent use of the neutral territory as has been before indicated."[1]

The case of *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, decided that an unarmed vessel was not within the Foreign Enlistment Act, 1819. In spite of the acquittal of one defendant in *R.* v. *Sandoval*, (1887) 56 L. T. 526, it cannot be said that this

[1] Hall's "International Law," 4th ed., p. 639.

is an inference from the later Act of 1870, which has made it a crime to build a ship.

The circumstance above stated that the *Alabama* was supplied with regular relays of the best Welsh coal recalls the fact that Lord Lansdowne has recently addressed a letter to the Chamber of Shipping of the United Kingdom, to the Association of Chambers of Commerce of the United Kingdom, and to other associations, warning them that British vessels supplying the Russian fleet with coal might render those concerned to liability under the Foreign Enlistment Act, 1870, s. 8, ss. (3) (4). It is an inference from the decision in the case of the *International*, (1871) 3 H. & E. 321, that a ship employed in the service of a foreign belligerent State to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent State, is employed in the military or naval service of that State within the meaning of the Foreign Enlistment Act, 1870. But to supply the squadrons of a belligerent at sea with coal would appear to constitute a more obvious interposition in the war by a neutral than to assist in laying a submarine cable to subserve military operations.

APPENDIX D.

The Foreign Enlistment Act, 1870, *and Coaling the Baltic Fleet with Welsh Coal.*

The Foreign Enlistment Act, 1819, prohibited, semble, a British ship acting as tender to a war vessel of a belligerent Power.

A QUESTION of great interest arises in connection with the fact, that a large fleet of German vessels is engaged in supplying Welsh coals to the Russian fleet. As will be seen, such an act was prohibited even by the Foreign Enlistment Act of 1819,[1] which was far less stringent than the Act of 1870. The Foreign Enlistment Act of 1870 applies to foreigners, whether in the United Kingdom or the Queen's dominions.[2] A German steamer, the *Captain W. Menzell*, has accordingly been detained at Cardiff.

The status of a German vessel, following the Baltic Fleet to supply it with coal, seems peculiarly open to question in view of the fact that German vessels, throughout the war, have been continually sold to the Russian Government to be converted into auxiliary cruisers. In *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340, 343, 344, when a British vessel, before and during the war between Peru and Spain, acted under the directions of two Peruvian rams, Kelly, C.B., observed that such a vessel was almost exactly in the same position as one of the Peruvian war vessels she accompanied, and was doing much more than merely carrying contraband of war.

The case of the *Tuscaloosa*.

A German vessel, therefore, which follows the Baltic Fleet to supply it with coal, seems to become a tender—in other words, a ship of war. In 1863 the United States merchant-ship *Conrad* was captured by the *Alabama*. Her name was changed to the *Tuscaloosa*, and an officer and ten men, with two rifle twelve-pounder guns, were put on board, but her cargo of wool was not unshipped. She was then taken to the Cape of Good Hope, and the captain of the *Alabama* requested that she should be admitted into Simon's Bay as a tender of his vessel; in other words, as a ship of war. The Attorney-General of the colony gave it as his

[1] *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340.

[2] Cf. "the general rules of construction," laid down by Lord Russell of Killowen, L.C.J., in *R. v. Jameson*, (1896) 2 Q. B. 425, 430.

opinion that she had been sufficiently set forth as a vessel of war to justify the local authorities in admitting her as such, and that her real character could only be determined in the courts of the captor's country. She was allowed, therefore, to enter the port and obtain provisions. On the 26th of December, 1863, the *Tuscaloosa* again put into Simon's Bay, and was this time seized by the local authorities. This, however, was considered unjustifiable by the Home Government. Whatever the character of the ship might have been during her first visit, she was treated as a ship of war, and was therefore entitled to expect the same treatment again, unless she received warning that a different course would be pursued. Accordingly, orders were sent out to release and deliver her up to some Confederate officer; but, as a matter of fact, she was never delivered up to that Government.[1]

The Tribunal of Arbitration held at Geneva, September 14, 1872, decided with regard to the tenders of the *Alabama* and *Florida*—

"And so far as relates to the vessel called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer*, such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

According to Geneva Award, German vessels supplying Baltic Fleet with coal seem auxiliary vessels.

The German vessels supplying the Baltic Fleet are auxiliary vessels, and it does not seem at all conclusive, from the case of the *Tuscaloosa*, that such vessels may not commit an infraction of neutrality, irrespective of the action of the ships to which they are attached.

Action of German vessels has given rise to incident between neutrals.

In the highly exceptional circumstances of the present war, where neutral vessels are acting as tenders or auxiliary vessels to a belligerent fleet, an irritating incident may arise, not between either of the belligerents and a neutral State, but between neutral States. At the first blush it does not appear that we have anything but ourselves to blame for the severity of the Foreign Enlistment Act. The moral of the situation is summed up in the language of Mr. W. E. Hall, that "it is unwise for a people to enact or retain neutrality laws more severe than it believes the measure of its duty to compel."[2] If this view were entirely the correct one, we could not fairly blame the Germans. We should, on the contrary, only have ourselves to blame for having, by our domestic legislation, abandoned a profitable branch of maritime enterprise to another nation in time of peace, just as, in the eighteenth century, a mother-country, in time of war, voluntarily abandoned its colonial

[1] Wheaton's "International Law," ed. 1904, p. 590.

[2] Hall's "International Law," 4th ed., p. 637 and note.

commerce to the ships of a neutral State. The truth, however, is that there are grounds both for exception to the action of the Germans in supplying the Russian fleet with Welsh coal, and for complaining of the Foreign Enlistment Act, which, by subsections of the section under which supplying coal to a belligerent fleet is prohibited, creates a new crime and embarrasses an important branch of British industry. It is instructive to observe the dereliction Germany has committed against the standard of neutral obligation which she sought, when belligerent in 1870, to impose upon this country.

Inconsistency of action of Germany.

Sir R. Phillimore observes, in a spirit of learned irony, that every one of the Powers composing the league known as the Armed Neutrality, for the maintenance of international justice upon the principles of the Russian edict, departed from the obligation which they had contracted as neutrals as soon as they became belligerents, and returned without shame or hesitation to the practice of the ancient law.[1]

The observation of Junius that the character of the reputed ancestors of some men has made it possible for their descendants to be vicious in the extreme without being degenerate, has a certain bearing on international policy, since good faith may always be insisted on, Vattel observes, even between belligerent powers. It cannot be said, since Prussia joined the first Armed Neutrality,[2] that her present action, in supplying tenders to the Russian Baltic Fleet, is retrograde. But this plea is not good to defend, or even excuse, an infraction of neutral obligation.

In 1870 Germany made an extravagant claim that the English Government should prohibit the export of coal to France. This country declined to accede to the request, and merely prohibited vessels from sailing with supplies directly consigned to the French Fleet in the North Sea.[3] In 1904 Germany, now a neutral State, permits a large portion of her mercantile marine to engage in the worst form of the identical trade she sought in 1870, when belligerent, to prohibit the subjects of a neutral State from engaging in, even in an innocuous form. *Pollicitus meliora, tendis?* The weakness of a State affords some excuse for inconsistent policy; and Korea, which at the present time maintains diplomatic relations with one belligerent, although after the commencement of hostilities it ratified a treaty by which it became a mere dependency of the other belligerent, affords a typical instance of the difficulty of the position of a weak neutral. But the flagrant infraction of neutrality

[1] Phillimore's "International Law," vol. iii. s. 191, p. 276.
[2] Ibid., vol. iii. p. 275.
[3] Hall's "International Law," 4th ed., p. 686.

connived at by the German Government is rendered more grave by her strength and influence.

International law and municipal law occupy different provinces.

Municipal legislation on the subject of neutrality does not govern questions between countries whose duties are solely regulated by international law. Sir J. F. Stephen points out that the Foreign Enlistment Act, 1819, had nothing to do with the *Alabama* affair, regarded as an international incident. The American complaint was equally well or ill founded, whether the Foreign Enlistment Act did or did not enable the Government to prevent British harbours from being turned into naval stations for the Confederates.[1] Sir Alexander Cockburn, in his reasons for dissenting from the Geneva Award (Parl. Papers, "N. America" (1783) (No. 2), p. 29), observed that municipal laws on the subject of neutrality, which any particular State may be pleased to enact, do not constitute the standard of that nation's neutral obligation. The international obligations of a neutral State are clearly to be measured by an absolute, and not by a relative, standard.

"Municipal law, if not co-extensive with the international law, will afford no excuse to the neutral, so neither on the other hand, if in excess of what international obligations exact, will it afford any right to the belligerent which international law would fail to give him."

But it cannot be doubted that an international obligation exists prohibiting neutral vessels from acting as coal tenders to a belligerent fleet, and German municipal legislation on the subject, reflecting faithfully such an obligation, might well be invoked by Japan. Less than half a century ago the Prussian Government incorporated in its Code of Municipal Law an article prohibiting the carriage by its subjects to any other nation of contraband, consisting of munitions of war, or of articles forbidden by treaties of the nations to whom it is carried.[2]

Coal merely subject of a limited usage,

It has been shown in another part of this work that coal is a subject of very limited usage, since the development of steam power at sea is later than the American Civil War. In view of the course she adopted in 1870, Germany cannot plead that she has not recognized any usage on the subject of the supply of coal to a belligerent fleet. The limited nature of the international usage with regard to coal, of course, accounts for the fact that in 1857 it was not in the catagory of the contraband articles which Prussian subjects were prohibited at that date from exporting.

But Germany has already acceded to it.

[1] "Hist. Crim. Law," vol. iii. c. xxxi. p. 261.

[2] Phillimore's "International Law," vol. iii. s. 283, p. 381, referring to *Preussisches Landrecht*, Bk. ii. s. 2034, p. 416.

Germany has never indicated she accedes to principles of Geneva Conference, 1872.

It must be added that Mr. W. E. Hall does not enumerate Germany in the category of the States which have acceded to the international usage prohibiting the construction and outfit of vessels intended for the naval or military use of a belligerent in neutral harbours. This is sufficiently obvious from the fact that German subjects, if not the German Government itself, have sold, during the present war, powerful auxiliary cruisers directly to the Russian Government. The disregard of neutral obligation exhibited by the German Government in 1904, in permitting German vessels to supply coals to a belligerent, after her belligerent pretensions in 1870, constitutes nothing less than an international fraud, as Lord Stowell treated all flagrant cases of contraband, on the injured belligerent Japan.

The following letter has, by direction of the Marquis of Lansdowe, been addressed to the Chamber of Shipping of the United Kingdom, to the Association of Chambers of Commerce of the United Kingdom, and to certain other associations:—

"Foreign Office, November 25, 1904.

Communiqué of British Foreign Office, November 25, 1904.

"Sir,—On the 25th ultimo a letter was received by the Foreign Office from Messrs. Woods, Tyler, and Brown, asking whether it was permissible 'for British shipowners to charter their boats for such purposes as following the Russian fleet with coal supplies;' and, by the Marquess of Lansdowne's directions, they were informed that 'it is not permissible for British owners to charter their vessels for such a purpose.'

"In view of the numerous inquiries which have been addressed to his Majesty's Government on this subject, I am instructed to explain that action of the kind described in Messrs. Wood's letter might render those concerned liable to proceedings under subsections 3 and 4 of the 8th section of 'The Foreign Enlistment Act, 1870.'[1] This section, so far as is material, runs as follows:—

"(8) If any person within her Majesty's dominions, without the licence of her Majesty, does any of the following acts; that is to say—

"(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or,

"(4) Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State:

"Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:—

"(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court

[1] 33 & 34 Vict. c. 90.

before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to her Majesty.

"The interpretation clause, section 30, defines 'naval service' and 'equipping' as follows:—

"'Naval service' shall, as respects a person, include service as a marine, employment as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport store-ship, privateer, or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store-ship, privateer, or ship under letters of marque.

"'Equipping' in relation to a ship shall include the furnishing of a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly.

"'Ship and equipment' shall include a ship and everything in or belonging to a ship."

A similar question arose in 1870 during the Franco-German War, and on the 1st of August of that year a question on the subject was put to and answered by Mr. Gladstone, then Prime Minister. The Foreign Enlistment Act then in force was that of 1819,[1] containing provisions similar, upon this point, to those of the Act of 1870, which was about to replace it, and which received the Royal assent on the 9th of August. The question and answer were as follows:—

"Mr. Stapleton asked the First Lord of the Treasury whether his attention had been called to the report that the French Fleet in the Baltic is to be supplied with coal direct from this country; whether it would be consistent with neutrality to allow any vessels, either French, English, or others, to carry coal direct from this country to a belligerent fleet at sea; and whether English vessels so engaged would be entitled to the protection of their country if the other belligerent should treat them as enemies, considering them part of the armament to which they were acting as tenders?

"Mr. Gladstone replied: 'Sir, the House has already been apprised, on more than one occasion, that there is nothing in a general way to prevent the exportation of coal from this country. If either of the belligerents capture those vessels supplying coal, the question whether it is contraband of war will be a question for the consideration of the court of the captors. But the honourable gentleman has called attention to a particular case; and although the exportation of coal is not generally prohibited,

[1] 59 Geo. III. cap. 69.

exporters being warned that if it be supplied to either of the belligerents they run the risk of capture, yet of course the case reported, which I can neither affirm nor deny, as I have no more knowledge of it than he has—that is to say, the knowledge derived from general rumour—presents itself under a somewhat different aspect, and in that form the question has been referred to the Law Officers of the Crown. They have given their opinion, which we have adopted, that if colliers are chartered for the purpose of attending the fleet of a belligerent, and supplying that fleet with coal for the purpose of enabling it to pursue its hostile operations, such colliers would, to all practical intents and purposes, become store-ships to that fleet, and if that fact were established they would be liable, if within reach, to the operation of the English law under the provisions of the Foreign Enlistment Act. It will be the duty of the Government, and they will act upon that duty, when such reports arise, to institute searching inquiries into the existence of any such cases.

"Although therefore neutral traders may carry on trade even in contraband with belligerent subjects to the risk of capture of their goods, it is necessary that such traders should bear in mind the condition of the law of this country as set forth in the foregoing enactments, which, moreover, have been applied recently by Orders in Council in British Protectorates, and also in countries where the King exercises extra-territorial jurisdiction over his own subjects.

"I am, etc.,
"(Signed) F. A. Campbell."

From the *Times*, November 28, 1904:—

"There have been two cases where proceedings have been taken in the Admiralty Court under the Foreign Enlistment Act, 1870, against a vessel which was alleged to have been an illegal ship under the eighth section.

"In the case of the *International*, (1871) 3 A. & E. 321, the vessel was seized by officers of her Majesty's Customs when lying in the Thames, December 21, 1870, under the power conferred on the Secretary of State by the s. 23 of the Act. Sir J. F. Stephen points out that 'extensive powers to seize suspected ships were given under the Act of 1870 (see sections 19–20), whereas the Act of 1819 dealt with the subject slightly, and in a manner shown by experience to be inadequate.'" (See s. 7, end.)[1]

Under the Act of 1870 it is not necessary to institute criminal proceedings when proceedings in admiralty have been instituted against the ship (s. 20), and the Secretary of State can detain the ship without instituting proceedings against the ship.[2] In the case of the *International*, the ship was merely detained, without

[1] "Hist. Crim. Law," vol. iii. p. 262.

[2] S. 23, and cf. observations of Sir R. Phillimore in the *International*, (1871) 3 A. & E. 321, 333.

any proceedings being instituted for its forfeiture, and the owners made an application in pursuance of the 23rd section of the Foreign Enlistment Act, 1870, for the release of the ship and cargo. The head-note to the case states that at a time when there was war between France and Germany, an English company entered into a contract with the French Government to lay down in the sea a series of telegraph cables between certain places on the French coast. The places on the coast between which the cables were to be laid were so situated that, by means of short telegraph lines carried over land, the series of cables could be united in one line, and be made to afford complete telegraphic communication between Dunkerque and Verdun. The company having shipped the telegraph cables on board a steamship belonging to them, specially fitted for the purpose of laying submarine cables, were, during the continuance of the war, about to dispatch the steamship from the port of London to lay down the cables according to the contract, when the steamship was, by order of one of her Majesty's principal Secretaries of State, detained upon the ground that it was about to be dispatched contrary to the Foreign Enlistment Act, 1870. On a motion for the release of the ship it was proved, to the satisfaction of the court, that the undertaking in which the ship was about to be engaged was of a commercial character; that the object of the contract was to furnish ordinary postal telegraphy, and that the company were not parties, directly or indirectly to any project for adapting the line of cable to military purposes. It was held that the company were entitled to have the ship released. Although the court considered it probable that the line, when completed, would be partially used for effecting communication between the armies of France, it held that such probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with the character of a "military or naval service" within the meaning of the Foreign Enlistment Act, 1870.

The case of the *International*, (1871) 3 A. and E. 321.

It appears from the judgment of Sir R. Phillimore that if any criminal or admiralty proceedings had been instituted in the *International*, subsection 4 of section 8, one of the subsections mentioned in the *communique* of the Foreign Office, November, 1904, would have been regarded as relevant. That subsection, it will be remembered, prohibits the dispatch of a vessel with the intention, etc., that it will be employed in the military or naval service of a foreign State at war with a friendly State. It is regarded as an implicit inference from this case by the learned reporter that the *International* would not have been released if the postal telegraphic line, for which telegraph cables were shipped on board the *International*, had borne a primary and paramount military character. No order was made as to costs and damages.

The case of the *Gauntlet*, (1872) 4 Privy Council Cases, 184.

Another case, tried under the same subsection prohibiting the dispatching of a ship, etc., also arose out of the events of the Franco-German War. The facts given in evidence in the case of the *Gauntlet*, (1872) 4 Privy Council Cases, 184, were that a French ship of war captured in the English Channel a Prussian ship as prize of war. A prize crew under a French naval officer was put on board. The prize ship being driven by stress of weather into the Downs, anchored within British waters, and after lying there two days the French Consul at Dover engaged an English steam-tug, then lying in the Downs, to tow the captured ship from British waters to a port of the captors, and under such agreement the tug towed the prize to Dunkirk Roads. In a suit instituted on behalf of the Crown for condemnation of the tug for violation of the Foreign Enlistment Act of 1870, s. 8, the judge of the Court of Admiralty held that no offence had been committed under that statute, as the steam-tug was not employed in the military or naval service of France, as declared by the 8th section of the Act, and dismissed the suit, condemning the Crown in costs. On appeal it was held by the Judicial Committee (reversing such decree) that the engagement by the owners of the tug for the express purpose of towing the detached prize crew, its prisoners and prize vessel, speedily and safely to French waters, where the prisoners and prize would be taken charge of by the French authorities, and the prize crew set free, was dispatching a ship, within the meaning of s. 8 of the Foreign Enlistment Act, 1870, for the purpose of taking part in the naval service of a belligerent, and condemned the tug as a forfeiture to the Crown.

This case further seems to establish that the Court of Admiralty has no power, under the Foreign Enlistment Act, 1870, s. 23, to condemn the Crown in costs. The Act says that—

"If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the commissioners of the treasury out of any moneys legally applicable for that purpose."

In the case of the *Gauntlet*, the Solicitor-General[1] argued that this provision did not empower the Court of Admiralty to condemn the Crown in costs. It is a rule that where there is no statutory enactment applicable, the Crown cannot be condemned in costs. Under the ordinary jurisdiction of the Admiralty Court, costs

[1] Sir George Jessel.

cannot be given against the Crown unless the Attorney-General is a party. James, L.J., however, declined to decide the point whether the Court of Admiralty has power to condemn the Crown in costs under the Foreign Enlistment Act, 1870, as he had not the assistance of the arguments on the other side.[1] The expression in the Act (s. 23) that the owner of the vessel, where there was no probable cause for the detention, shall be awarded compensation out "of any moneys legally applicable for that purpose," seems hardly capable of being construed as a provision expressly empowering the Court of Admiralty to condemn the Crown in costs.

Although there was no provision in the Foreign Enlistment Act, 1819, corresponding to the above, and it might be inferred there was no power conferred on the Admiralty Court under that Act to condemn the Crown in costs, Lord Palmerston, speaking presumably on the advice of the Law Officers of the Crown, declared that he entertained great doubts whether the Crown would not have been liable to considerable damages if the *Alabama* had been seized.[2] In *R.* v. *Sandoval, Baird, & Call*, (1887) 3 T. L. R. 411, 419, A. L. Smith, M.R.,[3] alluded to "the very able argument of Mr. Finlay" on sects. 8, 11, of the Foreign Enlistment Act, 1870. It may be observed that in his address to the jury for Sir W. Call, Sir R. B. Finlay, A.G. (then Finlay, K.C.), frequently alluded to cases occurring under the previous Act of 1819. A case which seems to afford a singularly close analogy in its facts to that of British shipowners chartering their boats for the purpose of following the Russian fleet with coal supplies was that of *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340. The case was not tried under the Foreign Enlistment Act, 1819, a circumstance, however, which does not affect the weight of the decided opinion expressed in that case. It is further of importance as establishing that where the contract with a seaman is to employ him free from any other perils than those which are incidental to an ordinary voyage for commercial purposes, but he is, in fact, employed as a seaman on a tender to the war vessels of a belligerent, the master or captain commits a breach of contract in exposing the seaman to extraordinary and unforeseen dangers. The evidence of the plaintiff, which was uncontroverted, was stated by Kelly, C.B., to be as follows :—

"At the time when the vessel quitted England, war had not

[1] The *Gauntlet*, (1872) 4 Privy Council Cases, 184, 194.

[2] "Hansard's Parliamentary Debates," vol. clxx. p. 91, referred to in *Attorney-General* v. *Sillem*, (1863) Q. H. & C. 431, 467.

[3] Then A. L. Smith, J.

actually broken out between Peru and Spain, but on the 25th of February, 1866, war was declared, and was notified in the *Gazette*, and on the 13th of March the Queen's Proclamation enjoining strict neutrality was also published in the *Gazette*. It appears upon the evidence alike of the plaintiff and defendant that the ship took in a cargo of coals and provisions, together with 130 casks of ammunition, and two launches, one of them a steam launch, before she left the river. After touching at some places on the English coasts he came into the harbour of Brest, and was then joined by the *Independencia*, one of the two rams belonging to the Peruvian Government. She then went to Madeira, where she was joined by the *Independencia* and the other ram, called the *Huasca*, and there put 150 tons of coal on board the *Independencia*. She then left Madeira in company with the two rams, and rockets for signals were put on board the rams. The vessels next reached St. Vincent, signals passing between the rams and the *Thames*—the vessel in question. At St. Vincent the second launch was put over the ship's side into the *Independencia*, and two boats belonging to the *Huasca* were taken on board the *Thames*. From thence the *Thames* went to Pedro Bay, twelve miles south-west of St. Vincent, the two rams arriving shortly after her, and there she put on board one of the rams the 130 cases of ammunition. Thence she proceeded to Rio, where she arrived on the 31st of March, the two rams arriving there on the following day. Two days afterwards one of the rams sailed out of Rio, and captured and brought in as prize a Spanish brig, which was afterwards taken out and burnt. The admissions of the master or commander of the vessel showed that by charter-party it was intended that the vessel should be employed by the Peruvian Government, although she was nominally chartered for all lawful services and employments for twelve months. The charter-party contemplated that the vessel might be damaged or burnt by any enemy of Peru, in which case the charterers were to pay the company to which the vessel belonged £45,000. The master further admitted in evidence that several members of the crew, on arrival at Rio, insisted that the voyage was illegal, and desired to be put on shore. He also admitted that he told the consul that his destination was Callao, but that it was understood he was to act in all respects under the directions of the rams belonging to the Peruvian Government. The plaintiff left the ship at Rio, and was imprisoned as a Peruvian deserter for ten days. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes. There were two branches of the decision—(1) On the breach of contract; (2) on damages for imprisonment and loss of clothes."

On the first branch it was held *per* Kelly, C.B., Martin, and Piggott, BB. (Bramwell, B., doubting), that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would

expose him to greater danger than he originally had reason to anticipate. Kelly, C.B., observed "that if it were necessary to decide the question, I should hold that to serve on board a vessel used as a store-ship in aid of a belligerent, the fitting out of which to be so used is an offence within the seventh section, is 'serving on board a vessel for a warlike purpose in aid of a foreign state' within the second section." [1]

On the second branch of the decision it was held *per* Martin, Bramwell, and Channell, BB. (Kelly, C.B., dissenting), that the damages for the imprisonment at Rio and loss of clothes were too remote to be recoverable. This case is instructive in several ways. It seems, in the first place, difficult to conceive a case more like that of a British ship, at the present time, following the Russian fleet to supply it with coal than that of the vessel in *Burton* v. *Pinkerton*, which acted in all respects under the direction of the rams belonging to the Peruvian Government during the war between Peru and Spain in 1866. The Foreign Enlistment Act, 1819, like the Act of 1870 now in force, contained sections which exclusively relate to a state of war. In *Burton* v. *Pinkerton* (*supra*) the ship was fitted out before the declaration of war, and this circumstance rendered the offence against the seventh section of the Foreign Enlistment Act of 1819 incomplete. This consideration would clearly not apply to the case of a British or German vessel supplying Welsh coal to the Baltic Fleet.

A similar question arose in the case of the *Justitia*, the vessel in question in *R.* v. *Sandoval, Baird, & Call*, (1887) 3 T. L. R. 411, a case tried, but dismissed under the Foreign Enlistment Act, 1870, s. 8, ss. (3). Eighteen out of twenty counts of a joint indictment formulated upon s. 8 came to an end on Sir R. B. Finlay, A.G. (then Finlay, K.C.), having pointed out that that section only applies when there is a foreign State at war with a friendly State. The eighth section refers and applies to a contemporaneous state of belligerency, and not to a subsequent one.[2] In his famous summing-up in *R.* v. *Jameson*, Lord Russell of Killowen, L.C.J., observed that the provisions of the Foreign Enlistment Act, 1870, are divisible into those that deal with a state of war, this country being at peace, and those that deal with a state of peace. The eighth section—the illegal shipbuilding section—falls under the former category; the eleventh section—the section relating to illegal expeditions—falls under the latter. In *R.* v. *Sandoval*, a defendant who was acquitted under the eighth was convicted under the eleventh section.

[1] *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340, 348.

[2] *R.* v. *Sandoval, Baird, & Call*, (1887) 3 T. L. R. 411, 414, 416.

R. v. *Sandoval, Baird, & Call*, (1887) 3 T. L. R. 411, as regards the offence of preparing an illegal expedition.

The facts in *R.* v. *Sandoval* were that the defendant, who was a foreigner, while residing in England purchased at Sheffield two Krupp guns, and at Birmingham a quantity of ammunition, and then caused the guns and ammunition to be shipped on board a trading ship for Antwerp, where they arrived, and where at the same time arrived the *Justitia*, which had been purchased also in England by another person in the name of that other's valet. The *Justitia* was then loaded at Antwerp with guns and ammunition. She took on board a number of generals and Sandoval, who asserted himself to be the commander, and sailed with "machinery for mines" and papers for Trinidad. Not being permitted to enter port at Trinidad, she sailed towards Grenada, and then the valet executed a transfer of the ship to one of the generals, whereupon the British flag was hauled down and the Venezuelan flag hoisted; the guns were mounted, the boats swung out-board, and boats full of armed men taken in tow. The *Justitia*—renamed the *Liberata*—proceeded along the Venezuelan coast, had an engagement with a Venezuelan war-vessel, fired at some forts and a custom-house, and finally went to St. Domingo, where she was seized by the authorities.[1] On these facts, as has been mentioned, the defendant Sandoval was convicted of preparing an illegal expedition, and was sentenced to one month's imprisonment and a fine of £500.

Burton v. *Pinkerton*, (1867) L. R. 2 Exch. 340, 348.

In *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340, 348, Kelly, C.B., concluded that even if the continued user of the *Thames* as a store-ship after the declaration did not bring the ship within the seventh section of the Foreign Enlistment Act, 1819, he was of opinion that so to employ the vessel was a breach of a contract to employ a seaman upon an ordinary commercial voyage. The fact that a vessel may be so employed as to constitute a breach of contract with the members of the crew without the committing of an offence against the Foreign Enlistment Act, seems of great interest at this moment. A seaman who, fully conscious of the nature of his employment, engaged in a British vessel chartered to follow the Russian fleet with coal supplies, would clearly be liable to criminal proceedings. But if engaged under a contract which, like that in *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340, admitted of being construed as a contract for employment free from any other perils than such as were incidental to a voyage for ordinary commercial purposes, it is implicit from that decision that a member of the crew could obtain damages as for breach of contract if employed on a British vessel chartered to follow the Russian Fleet with coal supplies.

Section 19 of the Foreign Enlistment Act, 1870 (33 & 34

[1] Wheaton's "International Law," ed. 1904, p. 610.

Vict. c. 90), provides that the Court of Admiralty shall, in addition to any power given to the court by the Act, have, in respect of any ship or other matter brought before it in pursuance of the Act, all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction. Where a cause is instituted, therefore, under the provisions of the Foreign Enlistment Act, against a ship in respect of which an offence is alleged to have been committed, the court may, with the consent of the Crown, order the ship to be released on bail. Accordingly, the release of the ship on bail was ordered in the case of the *Gauntlet*, (1871) 3 A. & E. 319. Sir R. Phillimore observed that—

"I incline to the opinion that I have power to order this vessel to be released on bail without any consent on the part of the Crown; but I entertain no doubt that I have power to do so with the consent of the Crown; and, as the Crown has given its consent, I shall order the vessel to be released on bail being given for the full value of the vessel and her equipment" (p. 320).

The application of the Crown for bail for costs was refused. The vessel was the same as that which, as has been seen, was subsequently condemned for towing the prize of a French ship of war from the Downs to Dunkirk Roads.

R. v. *Sandoval*, etc., *supra*, as regards the offence of dispatching an illegal ship.

The only other case of an indictment under the eighth section of the Foreign Enlistment Act, 1870, *R.* v. *Sandoval*, *Baird*, *& Call*, (1887) 3 T. L. R. 411, is also of importance as showing that under the subsection of the Act prohibiting the equipment of a vessel the cardinal point is the intention of the belligerent or neutral trader, and not the character of the vessel. The vendor of the vessel, in giving his evidence, said he would have been very sorry to have purchased the *Justitia* for warlike purposes. In the Court of Crown Cases Reserved, where it was held the vessel became an illegal expedition under s. 11, Wills, J., observed that "the expedition was not of a character to seriously affect our relations with a foreign Power."[1] The late Mr. W. E. Hall, speaking of the international usage prohibiting the construction and outfit of vessels intended for belligerent use in neutral ports, observes that jurists plant the foundation of the doctrine upon the intent of the belligerent agent or of the neutral trader, and not upon the character of the vessel.[2]

In *Attorney-General* v. *Sillem*, (1863) 2 H. & C. 431, 531, Lord Bramwell (then Bramwell, B.) declined to treat the Foreign

[1] *R.* v. *Sandoval*, (1887) 3 T. L. R. 436, 438.

[2] "International Law," 4th ed., pt. iv. c. iii. p. 640.

Enlistment Act, 1819, as "a mere enforcement of international law." This was in reference to the seventh section of the Act of 1819, forbidding the equipment of vessels intended for belligerent use, when this country was at peace. Even after the adverse award of the Geneva Conference, it remains true that the illegal ship-building section of the Foreign Enlistment Act, 1870, s. 8, cannot be regarded as an enforcement of international law. But as far as the ship-building section is concerned, it is undoubtedly true that it is an enforcement in terms of an inchoate international usage, prohibiting the construction and outfit of vessels intended for belligerent use in neutral ports.

Mr. W. E. Hall points out that this usage is only in course of growth, and is not yet old enough or quite wide enough to bind countries who have not acceded to it. Still, in 1888 it was adopted by the most important maritime Powers. But since then Germany has joined the ranks of important maritime Powers, and there is not the slightest evidence that she had voluntarily acceded to the usage which, therefore, cannot be supposed to bind her.

Lord Bramwell considered that the Act of 1819 permitted some things which are, and prohibited some things which are not, prohibited by international law. The ship-building section of the Act of 1870, now in force, falls under the category of a prohibition not existing by international law. On the other hand, both the Act of 1819 and that of 1870, in their sections treating of illegal expeditions, constitute mere enforcements of international law. Lord Russell, in the trial at bar of Dr. Jameson and his officers, observed that, according to the territoriality of sovereignty, the fundamental principle of international law, it meant war if, two nations being at peace, one permits its territory to be made the basis of a hostile military expedition into the territories of the other. The illegal expedition sections of the Foreign Enlistment Act, 1870, according to any construction of international obligation, merely prohibit what international law prohibits.

It is, further, of great importance that, according to "the general rules" laid down by Lord Russell of Killowen, L.C.J., in his rulings on the Area of the Operation of the Foreign Enlistment Act, 1870, the Act applies to all the persons in the United Kingdom or in the dominions of the Crown, including foreigners who, during their residence there, owe temporary allegiance to the sovereign.[1] There seems therefore to be no doubt that the case of German vessels shipping coal at Cardiff to supply the Russian Baltic Fleet comes within the operation of the Foreign Enlistment Act, 1870, s. 8, ss. (3) (4). For this there are clearly three irrefragable reasons—

[1] Cf. The *Queen* v. *Jameson and others*, (1896) vol. ii. Q. B. 425, 430.

(1) It has been seen that even under the previous Foreign Enlistment Act, 1819, admittedly less stringent than the present Act, the act of supplying coal to the warships of a belligerent was an offence when the vessel followed the warships, and the master and crew were British sailors.[1]

(2) There is a state of war existing between the two foreign countries, and therefore the facts of the present case do not cause the exception to arise from a state of war not existing at the date of the despatch of the vessel that was raised both in *Burton* v. *Pinkerton*, (1867) L. R. 2 Exch. 340, and *R.* v. *Sandoval*, (1887) 3 T. L. R. 411.

(3) The German colliers are engaged in shipping coal at a well-known port in the United Kingdom, and therefore Lord Russell of Killowen's "general rules of construction" apply, by which the operation of the Foreign Enlistment Act, 1870, extends to foreigners in the United Kingdom or the dominions of the Crown, who, during their residence here, owe a temporary allegiance to the sovereign, in respect to acts done by them in the United Kingdom or the Queen's dominions.

In *R.* v. *Sandoval* the defendant, an alien, was convicted and sentenced, as has been noticed, although it was expressly admitted by Day, J., in the Court of Crown Cases Reserved that he was not guilty of having infringed the Act in this country.[2] But the defendant, after having bought both guns and ammunition in England, superintended the loading of them on a British ship at Antwerp. Further, shortly after leaving Antwerp the defendant, on the high seas, asserted himself to be the leader of the expedition against Venezuela. When these acts were done the *Justitia* had the regular papers of a British ship and was owned by a British subject. In *R.* v. *Sandoval*, therefore, the Act operated on the doctrine of the territoriality of the merchant vessel. Historicus, who severely criticized the doctrine,[3] expressly admitted that a merchant vessel on the high seas in time of peace was like territory; and, as has been noticed, there was not a state of war existing at the date of the despatch of the *Justitia*, and therefore the vessel was not an illegal ship under the Foreign Enlistment Act, 1870, s. 8, ss. (3), though she was ultimately seized as a pirate at San Domingo and detained there for some time.

[1] *Burton* v. *Pinkerton*, *supra*.
[2] *R.* v. *Sandoval*, (1887) 56 L. T. Rep. 526, 528.
[3] Letters, "International Law," 201, 204.

APPENDIX E.

The Case of the "Calchas" and the Case of the "Cheltenham."

The facts in the case of the *Calchas* were as follow: The vessel, on a voyage from Paget Sound, bound to ports in Japan and China, was, on July 25, seized by the Vladivostock squadron on the ground that she carried contraband of war, and was taken to Vladivostock. Her cargo consisted of flour, cotton, and hewn beams. The prize court decided that the flour which she had on board for Japan was contraband, and that the same should be confiscated, and the steamer released and allowed to carry the balance of her cargo to Hong-Kong. The Russian Crown Advocate gave notice that he would appeal against the decision of their own prize court, and Messrs. Alfred Holt and Co., Liverpool, the managers of the line, now learn that this appeal was made on the ground that among the mail matter by the *Calchas* from America to Japan was information addressed by the Japanese officials containing financial news of especial value to the enemy. Messrs. Holt and Co. caused this information to be telegraphed to their agents at Tacoma, with instructions to give the United States Post Office notice that as a consequence they refused to carry in their steamers any United States mail for Japan. The *Calchas* was detained at Vladivostock, and, according to current information, still remains there. Meanwhile the port has become closed by ice.[1]

The hardship of this decision is shown by cursory reference to the principles of the law of contraband. The case of the *Calchas* is the case of a mail steamer, a class of vessel as to which Mr. W. E. Hall observed in 1888 that "much tenderness would no doubt now be shown in a naval war to them and their contents,"[2] substantially confiscated for the carriage of provisions, and this although the belligerent who captured the vessel, two months afterwards, declared that provisions were merely conditionally contraband. As Vladivostock is now an ice-bound port, the vessel

[1] *Times*, October 11, 1904. [2] Hall's "International Law," 4th ed., p. 703.

would have been confiscated for several months, even if the Admiralty Court at St. Petersburg had decided to release her. In case of salvage, it has always been considered that one element in computing the amount of a salvage award due to a vessel belonging to a well-known line is the dislocation of the service of the line which the salvage service rendered by the vessel involves. If ever captors were guilty "of wilful misconduct and vexation," to employ the language of Lord Stowell, it is in the case of the *Calchas*. The loss occasioned by the dislocation of the service of a line like the Holt line to Japan, by withdrawing a large steamer for the greater part of a year, cannot fail to be enormous.

The full consideration of the case of the *Calchas* touches two much-vexed questions of the law of contraband. The first question raised is whether provisions are absolute or unconditional contraband. At the time of the decision of the Vladivostock Prize Court, Russia swept into the class of absolute contraband even provisions. It has been seen that, among authorities, Loccenius is the only writer who treats provisions as generally contraband, though Vattel may be considered to have laid himself open to the suspicion of having done so. This subject has been fully discussed, and it has also been shown that, in consequence of the British protest of August 2, Russia receded from the untenable position she occupied in classing provisions as absolute contraband. It was observed in the *Times* that, in regard to the question of contraband, the present position of Russia on the one side and Great Britain and the United States on the other is this—food stuffs alone have been formally declared to be conditional contraband. Russia has notified Great Britain that she has no intention of departing from her original view that coal is contraband.[1] What right Russia has to claim that, according to her original view, coal is contraband can best be inferred from the circumstance, already mentioned, that during the West African Conference of 1884 she took occasion vigorously to dissent from the inclusion of coal amongst articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convocation, or instrument whatever which would imply its recognition as such.[2] This is placing rather too high a reliance on the maxim of Grotius, "Distinguendus erit belli status." It was further observed in the *Times* that Count Lamsdorff is prepared to give, if he has not actually given, the British Government the assurance of Russia's desire to apply the

[1] *Times*, September 26, 1904.

[2] Hall's "International Law," 4th ed., p. 686, referring to Parliamentary Papers, "Africa," No. iv., 1885, 132.

rule—of classing coal and other articles *ancipiti usus* which are not provisions as absolute contraband—with the greatest leniency. New instructions to prize courts and naval commanders are capable of a very wide and liberal interpretation as regards other articles besides provisions, and that it is the intention of the Russian Government that they should be interpreted in that way.

The leading case in our Reports on despatches being contraband of war is the *Atalanta*, (1808) 6 Rob. 440.[1] The judgment of Lord Stowell in this case is a storehouse of learning, eloquence, and lucid exposition, and may be fairly claimed as one of his greatest judgments. After having pointed out that it was proved that there were public despatches on board, that the fact was known to the master and supercargoes, who had endeavoured to conceal it, Lord Stowell proceeded—

"The question then is, What are the legal consequences attaching to such a criminal act? For that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of despatches, between the colonies and the mother-country of the enemy, is a service highly injurious to the belligerent, is most obvious. In the present state of the world, in the hostilities of the European Powers, it is an object of great importance to preserve the connection between the mother-country and the colonies, and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest, and, I may add, for the supply of civil assistance also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency, because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother-country kept up in time of peace? By ships of war, or by packets in the service of the State. If a war intervenes, and the other belligerent prevails to interrupt that communication, is any person stepping in to lend himself to the same purpose, under the privilege of an ostensible neutral character? Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, indefinitely beyond the effect of any contraband that can be

[1] The *Atalanta*, (1808) 6 Rob. 440, 454.

conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles XII., and might produce the most disastrous effect in a campaign, but that is a consequence so remote and accidental that, in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken, and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different, it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of an enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of a most noxious and hostile character."

In this case Lord Stowell condemned not only the cargo, but also the ship, for the carriage of despatches. But it appears, both from the judgment and the facts, how different the *Atalanta* was from that of the *Calchas*, where, as has been seen, an appeal has been successfully made by the captors on the ground that the *Calchas* was carrying despatches. The *Atalanta* was an American vessel engaged in the colonial trade of Holland, then at war with England. The despatches were given to the first supercargo, in the presence of the master, by the commander of Fort Bourbon, Île de France, from the military governor of the island. The vessel was actually detained several days in order that she might carry the despatch. The despatch was openly addressed to the Minister of Marine at Paris, and the vessel carried a French officer, Colonel Richmond, who was second in command at the Isle of France. Colonel Richmond was disguised as a planter, and the commandant who gave the despatch to the first supercargo told him that in the event of chase or capture he was to give the despatch to Colonel Richmond. The *Atalanta*, on leaving the Île de France, was first chased by the *Piedmontese* frigate, and then captured by an English privateer and taken to St. Helena. There she was apparently given up to an English man-of-war, the *Sir Edward Hughes*. The packet with the despatches had previously passed into Colonel Richmond's possession. Owing to apprehension of a rescue, some of the prisoners were placed on board the man-of-war, among them the second supercargo. When he was being conveyed there Colonel Richmond persuaded him to take care of a chest of tea, at the bottom of which the despatches were found. It was, however, amply shown that the second supercargo knew that the chest contained noxious correspondence. It is difficult to understand, conceding the

principle that the carriage of despatches is an aggravated instance of the conveyance of contraband, how the decision in the case of the *Atalanta*, where Lord Stowell condemned both cargo and ship, could have been otherwise. Lord Stowell treated the case as one where no doubt could exist, especially as the despatches were shown to contain many particulars of a purely military character, though it also appears that they dealt with distress then prevailing at the Île de France.

The *Atalanta* was the case of a vessel engaged in the colonial trade of a belligerent then prohibited by international law, on board of which despatches were received from a military officer of a belligerent, with the privity of the master and supercargoes. Further, the vessel was detained several days in order to receive the despatches, and she carried, as a passenger, a high military officer of a belligerent. The absurdity of comparing such a case with that of the *Calchas* is plain to demonstration.

The *Calchas* did not sail from one belligerent port to the other, and being the packet of a regular mail line ought to be exempted from penalty as a matter of course.[1] Further, the letters on which the successful appeal of the captors was founded in the case of the *Calchas* could not possibly have been delivered to her by the military officer of a belligerent State, as in the case of the *Atalanta*. Japan can only have diplomatic representatives at Tacoma, and it is a well-recognized principle that the despatches of an enemy's ambassador, or consul, resident in a neutral State, when delivered for conveyance to a neutral ship, are not liable to seizure, on the ground that the neutral State is *primâ facie* as much interested in such despatches as the belligerent State.[2] It seems at least possible to assume, from the character of the despatches found on the *Calchas*, which are described as containing valuable financial information, that they must be consular despatches, which are, *ipso facto*, not contraband. The successful appeal of the captors of the *Calchas* therefore seems to infringe two well-established principles—(1) that immunity is conceded as a general rule to mail-bags ; (2) that despatches sent from accredited diplomatic or consular agents residing in a neutral country to their Government at home, being presumably not written with a belligerent object, are distinctly marked as not liable to seizure.

It is clear, not only from Lord Stowell's decisions, but from modern international law as expounded by Mr. W. E. Hall, that the rationale of the seizure of despatches as contraband is that

[1] Hall's "International Law," 4th ed., p. 703.

[2] The *Caroline*, (1808) 6 C. Rob. 461 ; Hall's "International Law," 4th ed., p. 699 ; and Phillimore's "International Law," vol. iii. ss. 273, 274, pp. 370, 371.

it is considered a lawful object of war to interrupt the connection between a mother-country and its colonies. This is a most legitimate survival of the Rule of the War of 1756. But it has no real connection with the alleged carrying of despatches by a steamer which, like the *Calchas*, had its port of departure in a neutral independent State.[1]

It has recently been announced that the Supreme Naval Prize Court at St. Petersburg has upheld the decision of the Vladivostock Prize Court in the case of the *Cheltenham*. This decision is best summarized by saying that it involves the condemnation of both ship and cargo for conveying conditional contraband to a port which cannot fairly be considered belligerent. The cargo consisted of 67,500 sleepers and logs for the Fusan-Scout Railway, and 375 cases of beer. It therefore now appears that Russia considers she is at war with Korea, a conclusion strangely inconsistent with Count Lamsdorff's own language in the Russian protest of March, against Japanese action in Korea. In this protest, as has been seen, Count Lamsdorff stated that Russia, in view of the Japanese landing in Korea on the eve of the battle of Chemulpho, did not consider herself at war with Korea. Further, the Korean Minister remained at St. Petersburg, and was stated to have been present at the reception of Admiral Alexeieff on his return from the Far East. Again, assuming that Korea has become a protectorate of Japan, it does not follow, from the view of international law taken by Dr. Stephen Lushington, in the case of the Ionian ships, that she is therefore at war with Russia. On this view, while it is in Japan's power as suzerain state to declare war for her protected mi-souverain state, Korea, the latter remains at peace unless she declares war for her, and it does not appear that she has done so. The *Cheltenham*, therefore, cannot fairly be considered to have had a belligerent destination, and her cargo was only conditionally contraband. The Russian regulations declaring contraband, March 1st, 1904, explicitly state

[1] Since these words were written the *Calchas* was released on bail, and the Supreme Prize Court at St. Petersburg has upheld the decision of the Vladivostock Prize Court, but has stated additionally that the cotton and timber were condemned because they were destined for warlike purposes. It is very difficult to regard this as any real concession by Russia of the principle of conditional contraband, especially in view of the fact that since this decision (June 14, 1905) Russia has sunk three neutral vessels at sea. The question inevitably arises what use cotton and timber can be to an army in the field. According to information at present available, the wholly indefensible contention that the *Calchas* was carrying despatches does not seem to have been even discussed by the Supreme Court at St. Petersburg. It is worth while to add that the crew of the *Calchas* complained of harsh treatment at the hands of the Russian officers and reckless navigation (*Times*, Feb. 28, 1905). But for both such acts captors are responsible (*Vrow Johanna*, 4 C. Rob. 348; *St. Juan*, etc., 5 C. Rob. 33).

that the ship conveying contraband is only liable to be confiscated in cases of an aggravated nature. But this is inconsistent with the final decision of the Supreme Naval Court at St. Petersburg in the case of the *Cheltenham*. What Historicus considered the two indissoluble tests of contraband, hostile quality and hostile destination, seem alike absent in the case of the *Cheltenham*. How the conveyance of conditional contraband only can be an aggravated offence when the destination is dubiously hostile, is very hard to see.[1]

[1] Cf. *Times*, November 28, 1904.

APPENDIX F.

The Case of the "Allanton."

It is related in the *Times*, October 24, 1904, that the Admiralty Council, under the following circumstances, have reversed the decision of the Vladivostock Prize Court with regard to the *Allanton*. The Admiralty Council consisted of Admiral Avellan, President; four admirals; Professor de Martens representing the Foreign Office; Senators Tiesenhausen and Grave; and Mr. Wardrop, the British Consul. After putting some questions as to the ownership of the cargo, Admiral Avellan announced his decision to release the ship. The question of damages was not raised, it being intended, however, to raise a claim on this point through the proper channels later. It is impossible to regard this decision of the Admiralty Court, being clearly contradictory according to English notions of prize law, as entirely satisfactory. The court having held that the circumstances justified the arrest of the ship, it would appear that the captors should be entitled to their expenses. This result is unsatisfactory, and is contradictory to the practice of Lord Stowell. No decision of that great Admiralty lawyer ever decided that a vessel which, like the *Allanton*, had genuine papers disclosing a neutral destination, and which was exactly in its proper course, could be confiscated. But it is astonishing to observe, from the argument of M. Sheftel, of the Russian bar, that this conclusion can be supported by the principles of modern continental maritime law, and, in great part, from the Russian naval regulations. The arguments of M. Sheftel, the claimant's counsel, in the case of the *Allanton*, are as follows. There were two principal considerations on which the judgment of the Vladivostock Prize Court was based. First, the *Allanton* on her first voyage conveyed, with the knowledge of the owner, to an enemy's port, Sasebo, during war, a full cargo conveying contraband. Secondly, the vessel was seized carrying coal from Muroran to Singapore under circumstances inducing the belief that that was not her real destination.

M. Sheftel then proceeded to argue that the first consideration was in no wise acceptable as constituting a sound plea for confiscating a ship as a lawful prize. It may be observed that even the Russian regulations declaring contraband merely contend that the ship ought to be confiscated in an aggravated case of the conveyance of contraband. But the decision of the Vladivostock Prize Court in the case of the *Allanton* involves the contention that Russia confiscates the ship in every case of the conveyance of contraband, as she did during the Crimean War, in spite of the fact that, according to the declaration of 1904, she has ostensibly abated her claim. The *Allanton*, as appears from the argument of M. Sheftel, could not, on any fair construction, be considered as engaged in a contraband transaction, either when proceeding to Muroran or when leaving that port. M. Sheftel proceeded to observe that the majority of the authorities on international law held that a vessel which succeeded in conveying contraband to a hostile port and was captured, not while it was engaged in doing so, but subsequently on the return voyage, could not be held liable to confiscation. Such was the principle enunciated by Prof. Franz Despagnet Prof. Franz von Liszt, and Prof. de Martens. Prof. de Martens, in his work, "International Law among Civilized Nations," positively asserted, that "In order that the seizure of a neutral vessel for conveying contraband should be lawful, it is necessary that the neutral vessel in question should be caught in *flagrante delicto*. Capture subsequent to the discharge of the unlawful cargo is not justifiable in law." In an even more striking sentence M. Sheftel observed that, according to Russian naval regulations in force, it was not permissible to seize a vessel for conveying contraband after she had discharged her cargo at the hostile port. The Russian regulations of March 27, 1900, regarding maritime prizes declared: "Mercantile vessels of neutral nations are liable to be confiscated as prizes when captured in the act of conveying contraband to the enemy or to an enemy port." This clearly implies that, according to regulations, a vessel is not liable to be seized after discharge of her cargo at the hostile port. In the case of the *Imina*, Sir W. Scott said—

"Taking it, however, that they (the goods conveyed, ship timber) are of such a nature as to be liable to be considered contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations you cannot take the proceeds in the return voyage. . . . If the goods

are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not generally held to attach."[1]

It therefore follows that the Vladivostock Prize Court, in proceeding on the principle that a vessel is liable to be confiscated after she has conveyed contraband to a hostile port, decided contrary both to modern continental maritime law as enunciated by its greatest living exponent, to maritime law as enunciated a hundred years ago by Lord Stowell, and to Russian naval regulations of the present day.

As to the second consideration on which the decision of the Vladivostock Prize Court proceeded, M. Sheftel observed that the charter-party was concluded a month before the outbreak of the war. He called the attention of the Admiralty Council of St. Petersburg to the fact that the Institut du Droit International at Venice, in 1896, laid down the principle that the carriage of contraband, commenced before the declaration of war and without necessary knowledge of its imminence, was not punishable. The ship-building sections of our English Foreign Enlistment Act, 1870, s. 8, only apply to a state of war actually existing; and there is clear analogy between conveying and supplying a contraband article. The loading and sailing of the *Allanton*, M. Sheftel observed, was completed before the publication of the Russian rules according to which coal was declared contraband. These regulations appeared in the *Times*, March 1, 1904. The owner had even conveyed coal to Vladivostock on another occasion. The mere suspicion of false destination is not ground for confiscation. The ship's papers had the authority of perfectly genuine proofs regarding destination of ship to which they belonged. The owner of the ship was the owner of the cargo, and therefore the latter was neutral property. In any case, it should be borne in mind that in virtue of the Declaration of Paris, April 27, 1856, and Article II. of the Marine Prize Regulations sanctioned by the Tzar, March, 27, 1895, a neutral flag covers an enemy's cargo provided it is not contraband. Therefore, even if the cargo of coal was Japanese property, it ought not to be confiscated, even though the Russian regulations regarding contraband declared coal contraband. Hostile destination, no less than hostile quality, constitutes a necessary element in determining whether or not a cargo falls under the category of contraband. In face of this contention it seems impossible to understand how the Admiralty Court of St. Petersburg, while releasing both vessel and cargo, could have held that the circumstances justified the captors in arresting the vessel. On the contrary, it appears that such an arrest conflicts with maritime prize

[1] The *Imina*, (1800) 3 C. Rob. 167, 168.

law as it has been understood both in England or Russia for more than a century. But since the Admiralty Prize Court did arrive at this paradoxical conclusion, it is as difficult to understand how any question of costs and damages remains open. Dr. Lushington observed that Lord Stowell only awarded costs and damages where the captors had been guilty of wilful misconduct or vexation. The St. Petersburg Prize Court, while it ought to have held that the captors of the *Allanton* were guilty of vexatious conduct, expressly decided that, in view of the circumstances, they were justified in arresting the vessel. Therefore the Admiralty Court of St. Petersburg seems to have stopped itself from awarding the owner of the *Allanton* the costs and damages at the hands of the captors which are due to him.

APPENDIX G.

The Question whether Provisions are Contraband and the Annual Increase in the Value of Food Imported into Great Britain.

The following figures may give some idea of the extent to which this country depends on imported food. Sir H. S. Maine quotes Sir James Caird as saying, in a paper published in 1887, that the food imported into Great Britain during that one year would probably reach 140 millions.[1]

A Parliamentary Blue Book, the Statistical Abstract for the United Kingdom in each of the last fifteen years from 1889 to 1903, fifty-first number, p. 102, Table 35, shows that the amount of food annually imported into this country is annually increasing, and in 1903 was more than eighty millions sterling above the value of the food imported into this country in the year 1887, according to Sir James Caird's estimate. In 1899 the value of the imports into this country under the head of food, drink, and tobacco was £210,341,368; in 1900, £219,969,854; in 1901, £224,761,895; in 1902, £224,403,658; in 1903, £232,285,146. These figures include all imports under the head of food, drink, or tobacco, whether from foreign countries or the colonies. The value of the wine and tobacco imported does not amount to eight millions, so the cumulative effect of the above enormous values in any one year, as far as food is concerned, is little affected by deducting the value of the wine and tobacco imported in any year. Again, the value of the food imported into this country from the colonies is not twenty-five per cent. of the total. We may agree with Sir H. S. Maine that the situation is one "of unexampled danger;" all the more so, since, as the Prime Minister pointed out in the House of Commons, there are many more important navies in the world than there were a quarter of a century ago. It is clear that it would make no difference, as far as the interception of our food supplies is concerned, whether a country at

[1] Lectures, "International Law," vi. p. 120.

war with England were to declare provisions absolute or conditional contraband. It seems a fair inference from the present war that provisions in future wars will be declared at least provisionally contraband. In one of the earliest discussions in the House of Commons in the present year on the subject of contraband, Earl Percy suggested that the contingency of provisions being declared contraband in any future war in which this country was concerned was one which could not be dismissed.

But, since the Whewell Lectures of Sir H. S. Maine, Great Britain has made, in time of peace, gigantic efforts to secure her naval ascendancy. Our naval strength has been doubled in little more than a decade, and the two-power standard has long been passed. The fact that we possess, as a nation, overwhelming naval strength, renders it possible to discount the danger of having our food supplies cut off in time of war. Still there would remain the danger from privateers or commissioned commerce destroyers; and it may be remembered that Sir H. S. Maine considered that we ought to accede to the principle of the immunity of all private property at sea, in order to secure a general prohibition of privateering among the great maritime nations of the world.

APPENDIX H.

The Changed Attitude of Russia on Absolute and Conditional Contraband.

THE following appeared in the *Times*, November 28, 1904:—

"At a recent meeting of the Liverpool Chamber of Commerce, Mr. F. E. Smith delivered an address on 'Contraband of War.' A resolution was adopted on the subject, and representations were made to Lord Lansdowne, from whom the secretary to the Chamber has received the following reply:"—

"Foreign Office, November 25, 1904.

"SIR,—I have laid before the Marquis of Lansdowne your letter of the 19th inst., in which, by direction of the Council of the Liverpool Chamber of Commerce, you ask for a more definite statement as to the position which his Majesty's Government has taken up with the Russian Government with respect to contraband of war, and in particular as to what articles besides food stuffs are to be conditionally contraband, and whether coal, cotton, and machinery come under this category.

"Communications on this subject are still passing between the two Governments, and Lord Lansdowne is not at present in a position to add materially to the statement which has already been made public. His Majesty's Government have, as you are aware, from the first objected to the extension of the doctrine of contraband of war under which such articles as coal, cotton, and machinery have been classed as unconditionally contraband, and they adhere to the opinion which they have expressed on this point. The Russian Government have, however, not as yet shown any disposition to regard coal otherwise than as absolute contraband, or to yield to the representations which his Majesty's ambassador has, as you are aware, addressed to them on the subject of raw cotton. With regard to machinery, the wording of the decision of the prize court in regard to certain machinery on board the *Calchas* confirms the view that it will be liable to condemnation if any is proved to be intended for warlike use.

"His Majesty's Government have, as already indicated on more than one occasion, stated that they would not consider themselves bound to recognize as valid any decision confirmed by the prize

courts of last resort which might be inconsistent with well-established principles of international law, and they will strenuously support claims for compensation put forward by British subjects whose interests have suffered in consequence of any such decisions. It is proper to bear in mind that since the date, in September last, when the Russian Government issued supplementary instructions to their naval officers, the right of visit and search has not been exercised in a manner to which his Majesty's Government could reasonably take exception. A Parliamentary paper comprising the correspondence which has taken place in regard to these questions will be issued at an early date.

"I am, Sir, your most obedient, humble servant,

"F. H. CAMPBELL."

It has been endeavoured to show, in a previous portion of this work, that the effect of the Russian declarations regarding contraband, is to annul the second article of the Declaration of Paris, and that perfect liberty of neutral nations to trade in ordinary goods which have no relation to war, any attempt to interrupt which Vattel denounces as "a flagrant injury."[1] Russia has attempted nothing less, since her regulations declaring contraband pronounced certain commodities to be absolute contraband which, by continental maritime jurisprudence, have not even been considered conditionally contraband.

The best comment on the foregoing communication from the Foreign Office is the letter of Professor T. E. Holland, in which, after discussing Russian Prize Law and the destruction of neutral vessels without the adjudication of a prize court, he observed (*Times*, August 6, 1904)—

"A far more important question is, I venture to think, raised by the Russian list of contraband, sweeping, as it does, into the category of 'absolutely contraband articles,' things such as provisions and coal, to which a contraband character, in any sense of the term, has usually been denied on the continent, while Great Britain and the United States have admitted them into the category of conditional contraband only when shown to be suitable and destined for the armed forces of the enemy or for the relief of a place besieged. Still more unwarrantable is the Russian claim to interfere with the trade in raw cotton. Her prohibition of this trade is wholly unprecedented, for the treatment of cotton during the American Civil War will be found on examination to have no bearing on the question under consideration. I touch to-day upon this large subject only to express the hope that our Government, in concert, if possible, with other neutral governments, has communicated to that of Russia, with reference to its list of prohibited articles, a protest in language as unmistakable as that employed by our Foreign Office in 1885. 'I regret to have to inform you, M. l'Ambassadeur,' wrote Lord Granville,

[1] "Droit des Gens," l. iii. c. vii. s. 112.

'that her Majesty's Government feel compelled to take exception to the proposed measure, as they cannot admit that, consistently with the law and practice of nations, and with the rights of neutrals, provisions in general can be treated as contraband of war.' A timely warning that a claim is inadmissible is surely preferable to waiting till bad feeling has been aroused by the concrete application of an objectionable doctrine."

The only result of the protest seems to be that Russia has taken provisions and perhaps machinery out of her category of absolute contraband. Coal and raw cotton remain, as before, absolute contraband under the Russian regulations declaring contraband. Yet, as has been seen, Russia, during the West African Conference of 1884—

"Took occasion to dissent vigorously from the inclusion of coal among the articles contraband of war, and declared that she would categorically refuse her consent to any articles in any treaty, convocation, or instrument whatever which would imply its recognition as such."[1]

With regard to Professor T. E. Holland's observation that the treatment of cotton during the American Civil War has no bearing on the action of Russia during the present war declaring cotton absolute contraband, it may be recalled that the view on which the Federal Government declared cotton contraband was that it took the place of money. The Confederate Government expressly prohibited the sale of cotton during the Civil War, except to furnish the sinews of war.[2]

It is clear, therefore, that it is impossible to institute any comparison between the two cases. During the Civil War the Federals declared raw cotton exported from the Confederate States contraband when it had been appropriated as the property of the other belligerent Government. During the present Russo-Japanese War Russia has declared imported raw cotton contraband. As imports have to be paid for, the practical consequence of the Russian prize regulations appears to be to maintain rather than to reduce the pecuniary resources of Japan. Lord Granville's protest, to which Professor T. E. Holland referred in the above letter, was made to the French Ambassador when France sought, during her hostilities in 1885 with China, to declare rice contraband.[3] It is there stated that shipments of rice were entirely stopped by fear of capture.

[1] Hall's "International Law," pt. iv. c. v. p. 686, referring to Parl. Papers, "Africa," No. iv. 1885, 132.

[2] Ibid., 4th ed., pt. iv. c. v. p. 690.

[3] Ibid., 4th ed., pt. v. c. v. p. 688.

APPENDIX I.

The authors are indebted to the editor of the *Times* for the following text, translation, and comparative analysis of the Report of the North Sea Commission :— [1]

TEXT OF THE REPORT.

After announcing that the sitting had begun, Admiral Fournier, the presiding Commissioner, proceeded without further preface to read the report. It ran thus :—

RAPPORT DES COMMISSAIRES ÉTABLI CONFORMÉMENT À L'ARTICLE 6 DE LA DÉCLARATION DE SAINT-PÉTERSBOURG DU 12 (25) NOVEMBRE, 1904.

1er. Les Commissaires, après un examen minutieux et prolongé de l'ensemble des faits parvenus à leur connaissance sur l'incident soumis à leur enquête par la Déclaration de Saint-Pétersbourg du 12 (25) Novembre, 1904, ont procédé dans ce rapport à un exposé analytique de ces faits suivant leur enchaînement rationnel.

En faisant connaître les appréciations dominantes de la Commission en chaque point important ou décisif de cet exposé sommaire, ils pensent avoir mis suffisamment en lumière les causes et les conséquences de l'incident en question en même temps que les responsabilités qui s'en dégagent.

2. La seconde escadre Russe de la flotte du Pacifique, sous le commandement en chef du Vice-Amiral Aide-de-camp Général Rojdestvensky, mouillait le 7 (20) Octobre, 1904, auprès du Cap Skagen avec l'intention de faire du charbon avant de continuer sa route pour l'Extrême-Orient.

Il paraît, d'après les dépositions acquises, que, dès le départ de l'escadre de la rade de Réval, l'Amiral Rojdestvensky avait fait prendre des précautions minutieuses par les bâtiments placés sous ses ordres afin de les mettre pleinement en état de repousser pendant la nuit une attaque de torpilleurs, soit à la mer soit au mouillage.

[1] *Times*, February 27, 1905.

Ces précautions semblaient justifiées par les nombreuses informations des Agents du Gouvernement Impérial au sujet de tentatives hostiles à redouter, et qui, selon toutes vraisemblances, devaient se produire sous la forme d'attaques de torpilleurs.

En outre, pendant son séjour à Skagen l'Amiral Rojdestvensky avait été averti de la présence de bâtiments suspects sur la côte de Norvège. Il avait appris, de plus, par le Commandant du transport *Bakan*, arrivant du nord, que celui-ci avait aperçu la nuit précédente quatre torpilleurs ne portant qu'un seul feu et en tête de mât.

Ces nouvelles décidèrent l'Amiral à avancer son départ de vingt-quatres heures.

3. En conséquence, chacun des six échelons distincts de l'escadre appareilla séparément à son tour et gagna la Mer du Nord, indépendamment, dans l'ordre indiqué par le rapport de l'Amiral Rojdestvensky; cet officier général commandant en personne le dernier échelon formé par les quatre nouveaux cuirassés *Prince Souvoroff*, *Empereur Alexandre III.*, *Borodino*, *Orel*, et le transport *Anadyr*.

Cet échelon quitta Skagen le 7 (20) Octobre à 10 heures du soir.

La vitesse de 12 nœuds fût prescrite aux deux premiers échelons, et celle de 10 nœuds aux échelons suivants.

4. Entre 1 heure 30 et 4 heures 15 de l'après-midi du lendemain, 8 (21) Octobre, tous les échelons de l'escadre furent croisés successivement par le vapeur Anglais *Zéro*, dont le Capitaine examina avec assez d'attention les différentes unités pour permettre de les reconnaître d'aprés la description qu'il en fit.

Les résultats de ses observations sont conformes d'ailleurs en général aux indications du rapport de l'Amiral Rojdestvensky.

5. Le dernier navire croisé par le *Zéro* était le *Kamchatka*, d'après la description qu'il en donna.

Ce transport, qui formait primitivement groupe avec le *Dmitri Donskoi* et le l'*Aurora*, se trouvait donc alors attardé et isolé à une dizaine de milles environ en arrière de l'escadre; il avait été obligé de diminuer de vitesse à la suite d'une avarie de machine.

Ce retard accidentel fût peut-être la cause incidente des événements qui suivirent.

6. Vers 8 heures du soir, en effet, ce transport rencontra le bâtiment Suédois *Aldebaran* et d'autres navires inconnus, qu'il canonna sans doute par suite des préoccupations que lui causaient dans les circonstances du moment son isolement, ses avaries de machine et son peu de valeur militaire.

Quoiqu'il en soit, le Commandant du *Kamchatka*, transmit à 8 heures 45 à sou Commandant-en-chef par la télégraphie sans fil, au sujet de cette rencontre, l'information qu'il était "attaqué de tous côtes par des torpilleurs."

7. Pour se rendre compte de la part que cette nouvelle put prendre dans les déterminations ultérieures de l'Amiral Rojdestvensky, il faut considérer que dans ses prévisions les torpilleurs assaillants, dont la présence lui était ainsi signalée, à tort ou à raison, à une cinquantaine de milles en arrière de l'échelon des vaisseaux qu'il commandait, pouvaient le rejoindre pour l'attaquer à son tour vers 1 heure du matin.

Cette information décida l'Amiral Rojdestvensky à signaler à ses bâtiments vers 10 heures du soir de redoubler de vigilance et de s'attendre à une attaque de torpilleurs.

8. A bord du *Souvoroff* l'Amiral avait jugé indispensable que l'un des deux officiers supérieurs de son état-major fût de quart sur la passerelle de commandement pendant la nuit afin de surveiller, à sa place, la marche de l'escadre et de le prévenir immédiatement s'il se produisait quelqu'incident.

A bord de tous les bâtiments, d'ailleurs, les ordres permanents de l'Amiral prescrivaient que l'officier chef de quart était autorisé à ouvrir le feu dans le cas d'une attaque évidente et imminente de torpilleurs.

Si l'attaque venait de l'avant il devait le faire de sa propre initiative, et, dans le cas contraire, beaucoup moins pressant, il devait en référer à son Commandant.

Au sujet de ces ordres la majorité des Commissaires estime qu'ils n'avient rien d'excessif en temps de guerre, et particulièrement dans les circonstances, que l'Amiral Rojdestvensky avait tout lieu de considérer comme très alarmantes, dans l'impossibilité où il se trouvait, de contrôler l'exactitude des avertissements qu'il avait reçus des Agents de son Gouvernement.

9. Vers 1 heure du matin le 9 (22) Octobre, 1904, la nuit était à demi obscure, un peu voilée par une brume légère et basse. La lune ne se montrait que par intermittences entre les nuages. Le vent soufflait modérément du sud-est, en soulevant une longue houle qui imprimait aux vaisseaux des roulis de 5 degrés de chaque bord.

La route suivie par l'escadre vers le sudouest devait conduire les deux derniers échelons, ainsi que la suite des événements l'a prouvé, à passer à proximité du lieu de pêche habituel de la flottille des chalutiers de Hull, composée d'une trentaine de ces petits bâtiments à vapeur et couvrant une étendue de quelques milles.

Il résulte des dépositions concordantes des témoins Britanniques que tous ces bateaux portaient leurs feux réglementaires et chalutaient conformément à leurs règles usuelles, sous la conduite de leur maître de pêche, suivant les indications de fusées conventionnelles.

10. D'après les communications reçues par la télégraphie sans

fil, rien d'anormal n'avait été signalé par les échelons qui précédaient celui de l'Amiral Rojdestvensky en franchissant ces parages.

On a su depuis, notamment, que l'Amiral Fölkersam, ayant été conduit à contourner la flottille dans le nord, éclaira de très près avec ses projecteurs électriques les chalutiers les plus voisins et, les ayant reconnus ainsi pour des bâtiments inoffensifs, continua tranquillement sa route.

11. C'est peu de temps après qu'arrivai tà son tour, à proximité du lieu de pêche des chalutiers, le dernier échelon de l'escadre conduit par le *Souvoroff*, battant pavillon de l'Amiral Rojdestvensky.

La route de cet échelon le conduisait à peu près sur le gros de la flottille des chalutiers, qu'il allait donc être obligé de contourner, mais dans le sud, quand l'attention des officiers de service sur les passerelles du *Souvoroff* fut attirée par une fusée verte qui les mit en défiance.

Cette fusée, lancée par le maître de pêche, indiquait en réalité, suivant leurs conventions, que les chalutiers devaient draguer le côté tribord au vent.

Presque immédiatement après cette première alerte et en se rapportant aux dépositions, les observateurs, qui des passerelles du *Souvoroff* fouillaient l'horizon avec des jumelles de nuit, découvrirent "sur la crête des lames dans la direction du bossoir de tribord et à une distance approximative de 18 à 20 encablures," un bâtiment qui leur paruît suspect parce qu'ils ne lui voyaient aucun feu et que ce bâtiment leur semblait se diriger vers eux à contre bord.

Lorsque le navire suspect fut éclairé par un projecteur, les observateurs crurent reconnaître un torpilleur à grande allure.

C'est d'après ces apparences que l'Amiral Rojdestvensky fit ouvrir le feu sur ce navire inconnu.

La majorité des Commissaires exprime à ce sujet l'opinion que la responsabilité de cet acte et les résultats de la canonnade essuyée par la flottille de pêche incombent à l'Amiral Rojdestvensky.

12. Presque aussitôt après l'ouverture de feu par tribord, le *Souvoroff* aperçut sur son avant un petit bateau lui barrant la route et fut obligé de lancer sur la gauche pour éviter de l'aborder. Mais ce bateau, éclairé par un projecteur, fut reconnu être un chalutier.

Pour empêcher que le tir des vaisseaux fût dirigé sur ce bâtiment inoffensif, l'axe du projecteur aussitôt relevé à 45° vers le ciel.

Ensuite, l'Amiral fit adresser par signal à l'escadre l'ordre "de ne pas tirer sur les chalutiers."

Mais en même temps que le projecteur avait éclairé ce bateau de pêche, d'après le dépositions des témoins, les observateurs du *Souvoroff* aperçurent à bâbord un autre bâtiment qui leur parut

suspect, à cause de ses apparences de même nature que celles de l'objectif du tir par tribord.

Le feu fut aussitôt ouvert sur ce deuxième but et se trouva ainsi engagé des deux bords, la file des vaisseaux étant revenue par un mouvement de contre-marche à sa route primitive sans avoir changé de vitesse.

13. D'après les ordres permanents de l'escadre, l'Amiral indiquait les buts sur lesquels devait être dirigé le tir des vaisseaux en fixant sur eux ses projecteurs. Mais comme chaque vaisseau balayait l'horizon en tout sens autour de lui avec ses propres projecteurs pour se garer d'une surprise, il était difficile qu'il ne se produisit pas de confusion.

Ce tir, d'une durée de dix à douze minutes, causa de graves dommages dans la flottille des chalutiers. C'est ainsi que deux hommes furent tués et six autres blessés; que le *Crane* sombra; que le *Snipe*, le *Mino*, le *Moulmein*, le *Gull*, et le *Majestic* reçurent des avaries plus ou moins importantes.

D'autre part, le croiseur *Aurora* fut atteint par plusieurs projectiles.

La majorité des Commissaires constate qu'elle manque d'éléments précis pour reconnaître sur quel but ont tiré les vaisseaux, mais les Commissaires reconnaissent unanimement que les bateaux de la flottille n'ont commis aucun acte hostile; et la majorité des Commissaires étant d'opinion qu'il n'y avait, ni parmi les chalutiers, ni sur les lieux, aucun torpilleur, l'ouverture du feu par l'Amiral Rojdestvensky n'était pas justifiable.

Le Commissaire Russe, ne se croyant pas fondé à partager cette opinion, énonce la conviction que ce sont précisément les bâtiments suspects s'approchant de l'escadre dans un but hostile qui ont provoqué le feu.

14. Au sujet des buts réels de ce tir nocturne le fait que l'*Aurora* a reçu quelques projectiles de 47 millim. et de 75 millim. serait de nature à faire supposer que ce croiseur, et peut-être même d'autres bâtiments Russes, attardé sur la route du *Souvoroff* à l'insu de ce vaisseau, ait pu provoquer et attirer les premiers feux.

Cette erreur pouvait être motivée par le fait que ce navire, vu de l'arrière, ne montrait aucune lumière apparente, et par une illusion d'optique nocturne dont les observateurs du vaisseau-amiral auraient été l'objet.

A ce propos les Commissaires constatent qu'il leur manque des renseignements importants leur permettant de connaître les raisons qui ont provoqué la continuation du tir à bâbord.

Dans cette conjecture certains chalutiers éloignés auraient pu être confondus avec les buts primitifs et ainsi canonnés directement. D'autres, au contraire, ont pu être atteints par un tir dirigé sur des buts plus éloignés.

Ces considérations ne sont pas d'ailleurs en contradiction avec les impressions de certains chalutiers qui, en se voyant atteints par des projectiles et restant éclairés dans le pinceau des projecteurs, pouvaient se croire l'objet de tir direct.

15. La durée du tir sur tribord, même en se plaçant au point de vue la version Russe, a semblé à la majorité des Commissaires avoir été plus longue qu'elle ne paraissait nécessaire.

Mais cette majorité estime qu'elle n'est pas suffisamment renseignée, ainsi qu'il vient d'être dit, au sujet de la continuation du tir par bâbord.

En tout cas, les Commissaries se plaisent à reconnaître à l'unanimité que l'Amiral Rojdestvensky a fait personnellement tout ce qu'il pouvait, du commencement à la fin, pour empêcher que les chalutiers, reconnus comme tels, fussent l'objet du tir de l'escadre.

16. Quoiqu'il en soit, le *Dmitri Donskoi*, ayant fini par signaler son numéro, l'Amiral se décidá à faire le signal général de "cesser le feu;" la file de ses vaisseaux continua alors sa route et disparut dans le sud-ouest sans avoir stoppé.

A cet égard les Commissaires sont unanimes à reconnaître, qu'aprè sles circonstances qui ont précédé l'incident et celles qui l'ont produit, il y avait à la fin du tir assez d'incertitudes au sujet du danger que courait l'échelon des vaisseaux pour décider l'Amiral à continuer sa route.

Toutefois, la majorité des Commissaires regrette que l'Amiral Rojdestvensky n'ait pas eu la préoccupation, en franchissant le Pas de Calais, d'informer les autorités des Puissances maritimes voisines qu'ayant été amené à ouvrir le feu près d'ue groupe de chalutiers, ces bateaux, de nationalité inconnue, avaient besoin de secours.

17. Les Commissaires, en mettant fin à ce rapport, déclarent que leurs appréciations, qui s'y trouvent formulées, ne sont pas dans leur esprit de nature à jeter aucune déconsidération sur la valeur militaire ni sur les sentiments d'humanité de l'Amiral Rojdestvensky et du personnel de son escadre.

SPAUN,
FOURNIER,
DOUBASSOW,
LEWIS BEAUMONT,
CHARLES HENRY DAVIS.

TRANSLATION.

Report of the Commissioners Appointed in Conformity with Article 6 of the St. Petersburg Declaration of the 12th (25th) November, 1904.

1. The Commissioners after minute and prolonged examination of the *ensemble* of the facts that have come to their knowledge concerning the incidents submitted to them for investigation by the St. Petersburg declaration of the 12th (25th) November, 1904, have in this report proceeded to give an analytic statement of those facts in their logical order.

In communicating the principal opinions of the Commission on each important or decisive point of this summary *exposé*, they believe that they have thrown sufficient light upon the causes and the consequences of the incident in question, and at the same time upon the responsibilities resulting therefrom.

2. On the 7th (20th) October, 1904, the second Russian squadron of the Pacific Fleet, under the chief command of Vice-Admiral Aide-de-Camp General Rohzdestvensky, anchored near Cape Skagen with the intention of taking in coal before continuing its voyage to the Far East.

It appears, according to the deposition made, that from the time when the squadron left the roadstead of Reval, Admiral Rohzdestvensky had caused the vessels under his command to adopt minute precautions with the object of placing them fully in a position to repel an attack by torpedo-boats during the night, either at sea or when anchored.

These precautions seemed to be justified by the information frequently sent by the Agents of the Imperial Government respecting hostile attempts that were to be apprehended, and which in all probability would take the form of attacks by torpedo-boats.

Furthermore, during his stay at Skagen, Admiral Rohzdestvensky had been informed of the presence of suspicious vessels off the Norwegian coast. Besides, he had learned from the captain of the transport *Bakan*, who had come from the north, that on the night before he had seen four torpedo-boats, which had only a single light at the masthead.

This news caused the Admiral to leave twenty-four hours earlier than he had intended.

3. Consequently each of the six distinct sections of the squadron steamed off separately in turn, and reached the North Sea independently of each other in the order mentioned in Admiral Rohzdestvensky's report; this general officer commanding in

person the last section, composed of the four new battleships *Prince Suvaroff*, *Emperor Alexander III.*, *Borodino*, *Orel*, and the transport *Anadyr*.

This section left Skagen at 10 p.m. on the 7th (20th) October.

The first two sections were ordered to proceed at a speed of twelve knots, and the following sections at ten knots.

4. Between 1.30 and 4.15 on the following afternoon, the 8th (21st) October, all the sections of the squadron were passed in succession by the English steamer *Zero*, the captain of which vessel examined the different units closely enough for them to be recognized from his description of them. Moreover, the results of his observations are in general agreement with the indications given in Admiral Rohzdestvensky's report.

5. The last vessel passed by the *Zero* was the *Kamchatka*, according to the description which he (the captain of the *Zero*) gave of her.

This transport, which at first formed part of the same group as the *Dmitri Donskoi* and the *Aurora*, was, therefore, at the time alone and about ten miles behind the squadron, having been obliged to slacken speed owing to a damaged engine.

This accidental delay was perhaps incidentally the cause of the subsequent events.

6. As a matter of fact, towards eight o'clock in the evening this transport met the Swedish vessel *Aldebaran* and other unknown ships, which she fired upon, doubtless owing to the apprehensions aroused in the momentary circumstances by her isolation, the damages to her engines, and her slight fighting value.

However this may be, at 8.45 p.m. the captain of the *Kamchatka* despatched to his commander-in-chief by wireless telegraphy the statement respecting this meeting that he was "attacked on all sides by torpedo-boats."

7. In order to understand the influence which this news might have had upon the subsequent decisions of Admiral Rohzdestvensky it must be remembered that in his anticipations the attacking torpedo-boats whose presence had thus been announced to him, rightly or wrongly, as being some fifty miles behind the section of the ships under his command, might overtake him towards one o'clock in the morning in order to attack him in his turn.

This information decided Admiral Rohzdestvensky to signal to his ships towards ten o'clock at night to redouble their vigilance and to expect an attack from torpedo-boats.

8. On board the *Suvaroff* the Admiral had deemed it indispensable that one of the two superior officers of his staff should be on duty on the Commander's bridge during the night, in order to superintend in his stead the progress of the squadron and let him know immediately should any incident occur.

Moreover, on board all the ships the permanent orders of the Admiral prescribed that the chief officer on duty was authorized to open fire in case of a manifest and imminent attack of torpedo-boats.

If the attack were made from ahead he was to do so on his own initiative, and in the contrary case, much less pressing, he was to refer to his commanding officer.

With regard to these orders, the majority of the Commissioners considered that they involved nothing excessive in time of war and particularly in the circumstances which Admiral Rohzdestvensky had every reason to consider very alarming in view of the impossibility in which he found himself of verifying the accuracy of the warnings that he had received from the agents of his Government.

9. Towards one o'clock in the morning on the 9th (22nd) October, 1904, the night was semi-obscure, somewhat overshadowed by a slight and low mist. The moon only showed itself at intervals through the clouds. The wind blew moderately from the south-east, raising a long swell, which made the vessels roll 5 degrees on either side.

The course followed by the squadron towards the south-west necessarily led the last two sections, as was eventually proved, to pass in the neighbourhood of the habitual fishing-ground of the flotilla of the Hull fishing-boats, consisting of some thirty of these small steamers and covering an area of some miles.

It results from the consistent depositions of the British witnesses that all these boats carried their regulation lights and trawled according to their customary rules under the lead of their "admiral" and pursuant to the indications conveyed by conventional rockets.

10. According to communications received by wireless telegraphy nothing unusual had been signalled by the sections which preceded that of Admiral Rohzdestvensky in traversing these regions.

It subsequently transpired that, notably, Admiral Fölkersam, having been led to skirt the flotilla of the north, very closely examined the nearest trawlers with his electric searchlights, and having thus recognized them as inoffensive, quietly proceeded on his way.

11. It was shortly afterwards that the last section of the fleet, led by the *Suvaroff* flying Admiral Rozhdestvensky's flag, arrived in its turn near the trawlers' fishing-ground. The course taken by this section carried it nearly into the midst of the flotilla of trawlers, which it would have been obliged to skirt, but to the southward, when the attention of the officers of the watch on the bridge of the *Suvaroff* was attracted by a green rocket, which put them on their guard.

This rocket, fired by the "admiral," indicated in reality, according to their conventions, that the trawlers were to trawl on the starboard side to windward.

Almost immediately after this first alarm, according to the depositions, the observers on the bridge of the *Suvaroff*, who were scanning the horizon with night-glasses, discovered "on the crest of the waves in the direction of the starboard cathead and at an approximate distance of eighteen or twenty cables," a vessel which appeared to them suspicious, because they saw no light, and the vessel seemed to be coming straight towards them.

When the suspicious vessel was lighted up by a searchlight, the men of the watch believed they detected a torpedo-boat going at high speed.

It was for these reasons that Admiral Rohzdestvensky opened fire on the unknown vessel.

The majority of the Commissioners express on this point the opinion that the responsibility for this act and the results of the cannonade sustained by the fishing flotilla rests with Admiral Rohzdestvensky.

12. Almost immediately after opening fire on the starboard side the *Suvaroff* perceived ahead of it a small boat barring its course, and was obliged to turn to port in order to avoid colliding with it. But this boat, lighted up by a searchlight, was recognized as a trawler.

In order to prevent the firing of the vessels from being directed against this inoffensive boat, the axis of the searchlight was immediately raised 45 degrees.

Thereupon the Admiral signalled to the squadron the order "Not to fire on the trawlers."

But while the searchlight illuminated this fishing-boat, according to the depositions of the witnesses, the observers on the *Suvaroff* perceived on the port side another vessel which appeared to them suspicious because of its resemblance to that which they were firing on upon the starboard side.

Fire was at once opened on the second object, and was thus carried on from both sides, the line of ships having by a retrograde movement returned to its original course without having modified its speed.

13. In accordance with the permanent orders of the squadron the Admiral indicated the object on which the fire of the ships was to be directed by fixing the searchlights upon them, but as each ship swept the horizon in every direction around it with its own searchlights in order to guard against a surprise it was difficult to avoid confusion.

This firing, which lasted from ten to twelve minutes, caused serious damage to the trawler's flotilla. It was thus that two

men were killed, six others wounded, that the *Crane* sank, and that the *Snipe*, the *Mino*, the *Moulmein*, the *Gull*, and the *Majestic* suffered more or less serious damage.

On the other hand, the cruiser *Aurora* was hit by several projectiles.

The majority of the Commissioners declare that they lack precise elements to identify on what object the ships fired, but the Commissioners unanimously recognized that the boats of the flotilla committed no hostile act, and the majority of the Commissioners, being of opinion that there was no torpedo-boat either among the trawlers or on the spot, the fire opened by Admiral Rohzdestvensky was not justifiable.

The Russian Commissioner, not believing himself warranted in concurring in this opinion, stated his conviction that it is precisely the suspicious vessels that approached the Russian squadron for a hostile purpose that provoked the firing.

14. Respecting the real objects of this nocturnal firing, the fact that the *Aurora* was hit by a few projectiles of 47 millimetres and 75 millimetres would seem to be of a nature to give rise to the supposition that this cruiser, and perhaps even other Russian vessels, delayed on the track of the *Suvaroff* without that vessel being aware of it, may have provoked and attracted the first firing.

This error may have been caused by the fact that this ship seen from behind showed no visible light, and owing to a nocturnal optical illusion experienced by the observers on the flagship.

In this connection the Commissioners declared that they lack important information enabling them to ascertain the reasons which brought about the continuation of the firing on the port side. In presence of this conjecture certain distant trawlers might have been confounded with the original objects, and thus cannonaded direct. Others, on the contrary, may have been hit by a fire directed on objects further off.

These considerations, moreover, are not in contradiction with the impression of certain trawlers who, finding themselves hit by projectiles and remaining lit up in the radius of the searchlights, might have believed themselves to be the object of direct aim.

15. The duration of the firing on the starboard side, even from the standpoint of the Russian version, seemed to the majority of the Commissioners to have been longer than appeared necessary.

But this majority considered that it is not sufficiently informed, as has just been said, with regard to the continuation of the firing on the port side.

In any case, the Commissioners willingly acknowledge unanimously that Admiral Rohzdestvensky personally did all he could from beginning to end to prevent the trawlers, recognized as such, from being the objects of the fire of the squadron.

16. However that may be, the *Dmitri Donskoi* having eventually intimated her number, the Admiral decided to give the "stop fire" signal. The line of his ships then continued its route to the south-west without having stopped.

In this connection the Commissioners are unanimous in recognizing that, after the circumstances which preceded the incident and those which gave rise thereto, there was at the closing of the firing sufficient uncertainty as to the danger incurred by the section of the ships to decide the Admiral to proceed on his way.

At the same time the majority of the Commissioners regret that it did not occur to Admiral Rohzdestvensky, while going through the Straits of Dover, to inform the authorities of the neighbouring maritime Powers that, having been led into open fire in the vicinity of a group of trawlers, those boats of unknown nationality required assistance.

17. The Commissioners, in closing this report, declare that their appreciations formulated therein are not in their spirit of a nature to cast any discredit either on the military value or the sentiments of humanity of Admiral Rohzdestvensky and of the *personnel* of his squadron.

THE BRITISH AND RUSSIAN CONTENTIONS.

The following table gives the contentions of the British and Russian Governments, as set forth in the cases presented to the Commission by the British and Russian Agents on February 13, and the corresponding findings of the Commission :—

British Contentions.	Findings of the Commission.
I. That on the night of the 21st–22nd (8th–9th) October, 1904, there was in fact no torpedo-boat or destroyer present among the British trawlers or in the neighbourhood of the Russian fleet, and that the Russian officers were mistaken in their belief that such vessels were present, or in the neighbourhood, or attacked, or intended to attack, the Russian fleet.	I. Upheld by the majority of the Commissioners.
II. (*a*) That there was no sufficient justification for opening fire at all.	II. (*a*) Upheld by the majority of the Commissioners.
(*b*) When opened, there was a failure to direct and control the fire, so as to avoid injury to the fishing fleet.	(*b*) The Commissioners acknowledge unanimously that Admiral Rohzdestvensky personally did all he could to prevent the trawlers, recognized as such, from being the objects of fire of the squadron.
(*c*) The firing upon the fishing fleet was continued for an unreasonable time.	(*c*) The majority considered that firing was continued on the starboard side longer than was necessary, but that it was not sufficiently informed as to the duration of the fire on the port side.

III. That those on board the Russian fleet ought to have rendered assistance to the injured men and damaged vessels.

III. The Commissioners are unanimous in recognizing that there was at the close of firing sufficient uncertainty as to the danger incurred by the section of ships concerned to decide the Admiral to proceed on his way. The majority of the Commissioners regret that it did not occur to Admiral Rohzdestvensky while going through the Straits of Dover to inform the authorities of the neighbouring maritime Powers that the trawlers required assistance.

IV. That there was no fault of any kind in the conduct of those on the British trawlers or those connected with their management.

IV. The Commissioners unanimously recognized that the boats of the flotilla committed no hostile act.

Russian Contentions.	Findings of the Commission.
I. That the cannonade was caused exclusively by the approach of two torpedo-boats, proceeding without lights, and at full speed, towards the squadron.	I. The majority of the Commissioners are of opinion that there was no torpedo-boat among the trawlers. They consider that the *Aurora*, and perhaps other Russian vessels, delayed on the track on the *Suvaroff*, without that vessel being aware of it, may have provoked and attracted the first firing.
II. That the fire of the squadron was directed exclusively against the two suspicious vessels, and that the trawlers were only hit in consequence of unavoidable accidents.	II. The majority of the Commissioners declare that they lack precise evidence as to the object on which the ships fired.
III. That the squadron did everything in its power to diminish the risks incurred by the fishermen through the cannonade necessitated by the approach of the two torpedo-boats.	III. See reply to British contention II. (*b*).

The Russian Government drew the following conclusions from the evidence submitted to the Commission :—

A. That the cannonade of the Russian squadron on the night of October 21–22, 1904, was ordered and executed in the legitimate accomplishment of the military duties of the chief of a squadron.

A. The Commissioners find that the precautions taken by Admiral Rohzdestvensky to repel a torpedo attack were justified, but the majority hold that the fire opened by Admiral Rohzdestvensky was not justifiable.

B. That consequently no responsibility can possibly rest upon Admiral Rohzdestvensky or any of his subordinates.

B. The majority of the Commission are of opinion that the responsibility for the cannonade and its results rests with Admiral Rohzdestvensky.

APPENDIX J.

On the use of French Waters by the Russian Fleet.

THE question of the reception of belligerent vessels in neutral ports has already been discussed, and it has been seen that in principle, and, so late as 1861, in practice, there was no limit to the time during which a warship might remain in a neutral port when not actually receiving repairs. But the blockade of the *Nashville* by the *Tuscarora* in 1861, in Southampton Water, led to the adoption by the British Government of a rule that any vessel of war of either belligerent entering an English port should "be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;" in either of which cases the authorities of the port were ordered "to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." Mr. W. E. Hall anticipated that the twenty-four hours' rule was not unlikely to become more general, but that it could never be a rule of international law, because there was no indication of a correlative duty to enforce it incumbent upon the neutral.[1] But in view of the express language of the Geneva arbitrators, this does not seem so clear as regards the stay of the *Shenandoah* at Melbourne, which has, indeed, been greatly exceeded by that of Admiral Rohzdestvensky at Madagascar.[2] In 1865 the *Shenandoah*, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States; her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the

[1] "International Law," 4th ed., pp. 652, 653, and note.

[2] December 30, 1904—March 16, 1905.

Government of that country that "the main operation of the naval warfare" of the *Shenandoah* having been accomplished by means of the coaling "and other refitment," Melbourne had been converted into her base of operations. The protest of the United States was upheld by the Conference of Geneva, where it was declared that, "by a majority of three to two voices, the Tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is, therefore, responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865."[1] The Tribunal therefore held that the *Shenandoah* had used Melbourne as a base of naval operations, and that Great Britain had not used due diligence to prevent such use. Professor T. E. Holland appears to differ from Mr. W. E. Hall on the question whether the twenty-four hours' rule can become a rule of international law. While Mr. W. E. Hall criticized Bluntschli for considering that any rule of international law could ever oust the right of the neutral to vary his own port regulations, Professor T. E. Holland, though admitting that the twenty-four hours' rule is not yet a rule of international law, seems equally to consider that it is capable of becoming such, and that it is desirable that it should.[2] The rule is, no doubt, tending to become as general as Mr. W. E. Hall anticipated, whether it be regarded as a rule of purely municipal or of international law. Professor T. E. Holland pointed out that the twenty-four hours' rule is to be found in the neutrality proclamations issued in 1904 by the United States, Egypt, China, Denmark, Sweden, and Norway. Again, in 1898, during the Spanish-American War, the rule was adopted by both the belligerents of 1904. But the proclamations of most of the Continental Powers do not commit their respective Governments during the Russo-Japanese War to any period limiting the stay of a belligerent cruiser in their ports. The squadron of Admiral Rohzdestvensky has availed itself of this circumstance, not only as regards French ports, but as regards German ports in West Africa.[3]

[1] Cf. text of the award made on September 14, 1872, by the Tribunal of Arbitration held at Geneva, in Halleck's "International Law," vol. ii. p. 156.

[2] *Times*, April 21, 1905.

[3] Cf. *Times*, January 31, 1905, where a complete account of the itinerary of Admiral Rohzdestvensky's is given. The Baltic fleet arrived outside Gaboon, in the French Congo, on November 26, 1904. It effected some coaling operations there for four days, but apparently outside territorial waters. But from December 11 to 17 the Baltic fleet lay at Angra Pequena engaged in coaling operations, and while there was visited by the German official in charge on shore. The fleet then sailed direct for Madagascar, where it arrived on December 30.

In the letter above referred to Professor T. E. Holland called attention to the material clauses of the French circular, which runs as follows :—

"(1) En aucun cas, un belligérant ne peut faire usage d'un port Français, ou appartenant à un Etat protége, dans un but de guerre, etc. (2) La durée du séjour dans nos ports de belligérants, non accompagnés d'une prise, n'a été limiteé par aucune disposition spéciale, mais pour être autorisés à y sejourner, ils sont tenus de se conformer aux conditions ordinaires de la neutralité, qui peuvent se resumer ainsi qu'il suit :—(*a*) . . . (*b*) Les dits navires ne peuvent, à l'aide de ressources puisées à terre, augmenter leur matériel de guerre, renforcer leurs équipages, ni faire "des enrôlements volontaires, même parmi leurs nationaux." (*c*) Ils doivent s'abstenir de route enquête sur les forces, l'emplacement ou les ressources de leurs ennemis, ne pas appareiller brusquement pour poursuivre ceux qui leur seraient signalés ; en un mot, s'abstenir de faire du lieu de leur résidence la base d'une opération quelconque contre l'ennemi. (3) Il ne peut être fourni à un belligérant que les vivres, denrées, et moyens de reparations nécessaires à la subsistance de son équipage ou à la securité de sa navigation."

Under these regulations, Professor T. E. Holland observes, "All must evidently turn upon the wisdom and *bonne volonté* of the officials on the spot, and of the Home Government, so far as it is in touch with them." Mr. W. E. Hall observes that in France "all persons exposing the State to reprisals or to a declaration of war are liable to punishment under the Penal Code, which leaves the State to accommodate its rules to international law for the time being ; and in 1861, on the outbreak of the American Civil War, a Proclamation of Neutrality was issued, referring to the appropriate articles of the Code, and prohibiting all French subjects from 'assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties.' Under this proclamation six vessels which were in course of construction in French ports for the Confederate States were arrested."[1] During the American Civil War, therefore, France succeeded in maintaining a more correct attitude of neutrality than this country. But the question of the reception and stay of a belligerent cruiser in a neutral port presents many difficulties from the point of view of international law ; and Professor T. E. Holland has lately observed that it must prominently engage the attention of that Conference on the rights and duties of neutrals, the convening of which was among the *vœux* of the Hague Conference.

In view of the stay of Russian vessels at Djibutil on three occasions during the present war, and of the prolonged nature of

[1] Hall's "International Law," 4th ed., p. 638.

their visit to Madagascar and French Cochin-China, it seems very difficult to deny that some infraction of neutrality has occurred. The first visit of Russian war vessels to Djibutil may be put out of the question. The stay of Admiral Rohzdestvensky at Madagascar greatly exceeds in duration the stay of the *Shenandoah* at Melbourne in 1865. Negrin, who is cited by Mr. W. E. Hall as adequately stating the conditions upon which belligerent vessels are admitted into neutral ports, imposes no less than seven distinct restraints upon a belligerent cruiser in a neutral port. It is noticeable that he forbids the augmentation of armament. But this would not seem, in principle, a different act from using territorial waters for a training-ground. Again, Negrin forbids the use of territorial waters by a belligerent in order to watch his enemy or obtain information about his future movements.[1] Further, this is forbidden, as has been seen, by the "French circular." Even if Admiral Rohzdestvensky did not use the marginal waters of Madagascar for this purpose, it is very difficult to draw the same conclusion as regards his prolonged stay at Kamranh Bay from April 12 to 29. Professor T. E. Holland appears to take this view, evidently regarding the latter incident as of more importance than the former.[2] It is highly unsatisfactory that there should be an entire absence of reliable information as to what occurred in Cochin-China waters.

In discussing the *Shenandoah* incident, Mr. W. E. Hall objects to the Geneva award on this head, because there was no continued use of the neutral base in that case; and "continued use is, above all things, the crucial test of a base." During the present war there has certainly been a continued use of Djibutil by whole squadrons of Russian war vessels, though possibly not by the same squadrons. On one occasion Admiral Folkersahm, with the cruiser squadron of the Baltic fleet, spent a whole week at Djibutil, December, 1904. It is, however, material to observe that, in Mr. W. E. Hall's opinion, there may be a continued use, not merely by visiting repeatedly the same neutral port, but by frequenting other ports of the same neutral, equally calculated to facilitate the purposes of the belligerent.[3] But if this principle be merely applied with *primâ facie* consistency, it has an obvious relevance to incidents like the successive sojourns of the Baltic fleet, during the present war, at Madagascar and Kamranh Bay.

The situation has become considerably aggravated by the fact that Admiral Rohzdestvensky, after leaving Kamranh Bay, merely proceeded some fifty miles up the coast of French Indo-China to

[1] Hall's "International Law," 4th ed., p. 654, referring to Negrin, p. 180.

[2] Cf. *Times*, April 21, 1905.

[3] "International Law," 4th ed., p. 629.

Hon-kohe Bay, north of Nhatrang. It is stated that Hon-kohe Bay is a harbour within territorial limits offering the advantages of very deep water.[1] There is also a telegraph station at Hon-kohe Bay. The stay of the Russian fleet in the French waters of Cochin China and Indo-China is therefore nearly of a month's duration.

[1] *Times*, May 6, 1905.

APPENDIX K.

EXTRACT FROM *TIMES*, AUGUST 29, 1904, p. 10.

List of Russian Acts of Interference with Neutral Shipping since the outbreak of War in the Far East.

I.—Incidents at Port Arthur.

British Steamship *Foxton Hall.*—Seized in Port Arthur harbour after outbreak of hostilities. (She had arrived on February 4—*i.e.* four days before hostilities began—from Cardiff with cargo of coal for Russian navy.)

British Steamship *Wenchow.*—Detained under circumstances of great hardship at Port Arthur, February 8–14, with Japanese refugees from Ching-wan-tao on board.

British Steamship *Hsiping.*—Fired upon from Port Arthur on her way from Ching-wan-tao; ordered to Dalny, and detained there four days (February 18).

British Steamship *Hipsang.*—Fired upon July 16 by Russian destroyer and sunk; according to the finding of the Naval Court held at Shanghai, August 23, "without any just cause or reason."

II.—Operations of Admiral Wirenius's Squadron in Red Sea and Mediterranean.

British Steamship *Mongolia* (London to Sydney).—Stopped, February 20 in Red Sea, but allowed to proceed.

British Steamship *Mombasa* (London to Calcutta).—Stopped about same date in Red Sea, but allowed to proceed.

British Steamship *Ettrickdale.*—Seized and brought into Suez, February 27; released February 29.

British Steamship *Frankley.*—Seized and brought into Suez, February 27; released February 29.

British Steamship *Palawan.*—Stopped in Red Sea, but allowed to proceed.

British Steamship *Ben Alder.*—Stopped in Red Sea, but allowed to proceed.

(The Egyptian Government repeatedly protested against the Russian ships overstaying their time limits in Egyptian waters, and especially

against the prolonged stay of the *Dmitri Donskoi* at Suez under pretext of repairs.)

British Steamship *Mortlake*, German Steamship *Stuttgart*, Norwegian Steamer *Standart*.—Stopped off Port Said, March 13–16, by *Dmitri Donskoi*.

British Steamship *Osiris* (Brindisi to Port Said).—Stopped May 4 by Russian cruiser *Khrabry*, demanding surrender of Japanese mails; delayed for two hours.

III.—Operations of the Vladivostock Squadron.

British Steamship *Allanton*.—Seized June 16 (first raid) on homeward voyage; taken to Vladivostock and condemned by Prize Court, June 27, mainly on the ground, not that she was actually carrying contraband, but that she had carried contraband on her outward voyage.

German Steamship *Arabai*.—Seized July 22 (second raid), taken to Vladivostock; released about August 5, the cargo for Japan alone being confiscated.

British Steamship *Knight Commander*.—Sunk July 24 by Russian cruisers and subsequently adjudged a lawful prize by the Vladivostock Prize Court. No compensation.

German Steamship *Thea* (chartered by Japanese firm).—Sunk July 24 by Russian cruisers, and adjudged a lawful prize on the ground that she had lost her status as neutral ship. Compensation, nevertheless, granted to German owners.

British Steamship *Calchas*.—Seized on or about July 25, taken to Vladivostock; case still pending.

IV.—Operations of the "Peterburg" and "Smolensk" in the Red Sea.

British Steamship *Crewe Hall*, British Steamship *Menelaus*.—Stopped July 12 by the *Peterburg* off Jiddah, and detained for four hours for examination.

British Steamship *Malacca* (P. and O.).—Seized July 13 by the *Peterburg*; brought into Suez July 19 in charge of a prize crew; passed through the canal, and left Port Said July 21; released at Algiers, July 27.

British Steamship *Dragoman*.—Stopped July 15, but allowed to proceed; she was bound from the Russian port of Batum, in China.

German Steamship *Prinz Heinrich*.—Stopped July 15 or 16 by the *Smolensk*, and mail bags for Japan taken out of her; mail bags surrendered a couple of days later and sent on by British steamship *Persia*, which was stopped by the *Smolensk* for the purpose.

British Steamship *Dalmatia*.—Stopped July 17, but allowed to proceed.

British Steamship *Ceylon*.—Challenged July 18 by *Peterburg*, but allowed to proceed; she was homeward bound.

German Steamship *Scandia.*—Seized in the Red Sea, and brought back to Suez, July 24, in charge of a prize crew, but released same day, though she was stated to have 400 tons of rails for Japan on board.

British Steamship *Ardova.*—Seized by the *Smolensk* and brought back to Suez, July 25, in charge of a prize crew, but released same day.

British Steamship *Formosa.*—Seized and brought into Suez in charge of a prize crew, July 26; released July 27.

German Steamship *Holsatia.*—Seized and brought into Suez in charge of a prize crew, July 27; released at once.

British Steamship *City of Agra* and *Massilia.*—Stopped by Russian cruisers (exact date not stated), but allowed after examination to proceed.

British Steamship *Comedian.*—Stopped and papers examined by *Smolensk* (August 22) in South African waters, eighty miles from East London.

V.—Operations of New Cruisers (Transformed German Liners).

British Steamship *Manora.*—Challenged, August 6, twenty-five miles south of Finisterre.

British Steamship *Ronda.*—Stopped on voyage from Hull to Naples August 13, off Spanish coast.

British Steamship *Scotian.*—Stopped and examined, August 17, by *Ural* (ex *Maria Theresia*) off Straits of Gibraltar.

VI.—Operations of the Baltic Fleet.

British Steamship *Oldhamia.*—Seized by the Baltic Fleet on May 18, 1905. The officers were put on board the *Oleg*, driven to Manila after the battle in the Sea of Japan, May 28, 29. The crew were transferred to the *Dnieper* (ex *Peterburg*), and an entirely Russian prize crew took over the *Oldhamia*, which was ordered to Vladivostock, escorted by the converted cruisers *Kuban* and *Terek*. It is difficult to conceive a more improper exercise of the right of visitation and search than this case. Modern usage only allows the master of the merchantman to be summoned with his papers on board the belligerent cruiser.[1] The Prize Code of the Institute of International Law prohibits a belligerent from requiring any person whatever to be summoned on board the belligerent vessel which intercepts the neutral. Both usage and authority, therefore, are entirely opposed to such an act as that of the Baltic Fleet, in requiring the entire crew and officers of the neutral merchantman to leave their vessel to embark on the belligerent warships. This vessel reported sunk.

British Steamship *Cilurnum.*—Stopped June 2, 1905, by Russian cruiser *Rion* (ex *Smolensk*); bags of beans, cotton, and boxes of antimony thrown overboard. Russians left suddenly, stating vessel was released.

[1] The *Eleanour*, 2 Wheaton, 262.

British Steamship *St. Kilda.*—Stopped and searched by Russian cruiser *Dnieper* (ex *Peterburg*) on June 4, 1905, 60 miles north of Hong Kong while on voyage to Japan. Cargo consisted of jute, rice, and cotton, and therefore was only conditionally contraband. Sunk on June 5. Eleven Europeans, including the captain, detained on board the *Dnieper.*

APPENDIX L.

CHRONOLOGICAL TABLE OF THE NORTH SEA CRISIS.

Saturday, October 22, 12.30 *a.m.*

The Russian Baltic Fleet fires on the Hull fishing fleet when trawling, in a position about two hundred miles east by north of Spurn Head, on the Yorkshire coast, in latitude 55° 18′ N., and longtitude 5° E. Two men, Smith and Leggott were killed, and six wounded. One steam trawler, the *Crane*, was sunk, and three others, the *Moulmein*, *Snipe*, and *Mino* were riddled with shot.

Sunday, October 23, 6.30 *a.m.*

Four Russian battleships enter the Straits of Dover, followed by three more battleships at 7 a.m. Three cruisers and a collier pass down Channel at 2 p.m.

Two steam trawlers, belonging to the Hull fishing fleet, the *Moulmein* and the *Mino*, arrive at St. Andrew's Dock, Hull, in the afternoon, conveying the bodies of Smith and Leggott.

Monday, October 24.

The Foreign Office address urgent representations to the Russian Government, declaring the situation does not admit of delay.

His Majesty, in a letter to the Mayor of Hull, alludes to "the unwarrantable action" which the Russian Fleet perpetrated against the British fishing vessels.

The King sends for Lord Lansdowne. The Russian *chargé d'affaires* calls at the Foreign Office and expresses keen regret at the occurrence.

Count Benckendorff, the Russian Ambassador to the Court of St. James', is the object of hostile demonstrations on arriving at Victoria Station on his return from Silesia.

Tuesday, October 25.

Mr. Balfour arrives in London from Scotland.

Long interview, commencing 11 a.m., between Lord Lansdowne and Count Benckendorff.

Consultation between the Prime Minister and Lord Lansdowne at 12.30 p.m.

Sir Charles Hardinge, the British Ambassador at St. Petersburg, communicates to the Russian Government the terms of the British Note,

containing the official reports on the incident, intimating that the British Government will require complete satisfaction.

Lord Selborne, speaking at a banquet, declares that "an outrage, an inexcusable outrage, has been committed," but expresses confidence that Russia will render reparation.

The Hon. A Lyttelton, M.P., Secretary of State for the Colonies, at a public meeting at Leamington, refers to the action of the Russian Fleet as "either the result of a murderous intention or the result of a wicked negligence."

Wednesday, October 26.

Count Benckendorff calls on Lord Lansdowne at 11.30 a.m.

Series of meetings between Lord Lansdowne, Rear-Admiral Prince Louis of Battenberg, Director of Naval Intelligence, Lord Selborne, the Prime Minister, and Sir R. B. Finlay, K.C., M.P., Attorney-General.

Channel Fleet at Gibraltar ready to put to sea at a minute's notice. Mediterranean Fleet reported at Fiume and Pola.

Home Fleet arrives Firth of Forth from Cromarty at 5.30 p.m.

Sir Henry Campbell-Bannerman, at a public meeting at Norwich, declares an unparalleled and cruel outrage has been committed by a great fleet of warships upon unoffending fishermen.

Naval preparations at Portsmouth.

Right Hon. G. C. Brodrick, M.P., Secretary of State for India, at a banquet at Godalming, describes the action of the Russian Fleet as "an unprecedented outrage."

Lord Rosebery, in sending £100 to the victims of the North Sea incident, describes it as "an unspeakable outrage."

The Russian battleships *Imperator Alexander III.*, *Borodino*, *Orel*, and *Kniaz Suvaroff* arrive at Vigo. Others reported not far off.

Admiral Rohzdestvensky declares that the North Sea incident was inevitable, and that he acted according to his conscience.

Subscriptions for victims started in St. Petersburg.

Thursday, October 27.

Count Benckendorff, at an interview with Lord Lansdowne, hands him the Russian admiral's report on the outrage.

Prolonged conference at Downing Street between the Prime Minister, Lord Lansdowne, Lord Selborne, and the Attorney-General.

Count Benckendorff again calls upon Lord Lansdowne in the afternoon.

Great naval activity at Devonport. Funeral of the victims of the Hull outrage.

Mayor of Tokio telegraphs profound sympathy for victims of Russian outrages.

Friday, October 28.

Meeting of the Cabinet at the Foreign Office at noon. Meeting lasts an hour and a half.

Count Benckendorff confers with Lord Lansdowne both in the morning and after the meeting of the Cabinet.

Her Majesty Queen Alexandra sends for Mr. Balfour after the meeting of the Cabinet.

It is announced that the North Sea incident is to be referred to an International Commission under the articles of the Hague Convention, 1899, title iii.

Home fleet leave Firth of Forth for Portland.

The damaged trawler *Snipe*, and the mission ship *Joseph and Sarah Miles*, arrive at Hull with six wounded fishermen—Rea, Almond, Will Smith, Nixon, Ryder, Hoggart. Last named severely wounded.

Mr. Balfour, in a speech at Southampton, declares the prospect is favourable, that the Russian Government has expressed its profound regret, and that an international inquiry will be held.

Saturday, October 29.

Admiral Sir Cyprian Bridge, G.C.B., and Mr. Butler Aspinall, K.C., appointed by the President of the Board of Trade to report on the recent occurrences in the North Sea as to the quantum of damages and as to compensation.

Count Benckendorff confers for half an hour at the Foreign Office with Lord Lansdowne.

Lord Rosebery, addressing a great Liberal meeting at Trowbridge in the evening, "congratulates the nation, the King, and the Government on the dispersion of the black cloud that had rested on the peace of the world during the past week."

Monday, October 31.

The King sends for Mr. Balfour and Lord Lansdowne.

His Majesty sends Sir Frederick Treves to see Hoggart at the London Hospital.

Count Benckendorff call upon Lord Lansdowne.

Fourteen battleships, thirteen first-class armoured and other cruisers, and a strong flotilla of torpedo boats reported at Gibraltar.

At a late hour at night, Count Benckendorff has a conference, lasting an hour and a half, with Lord Lansdowne.

Tuesday, November 1.

Admiral Rohzdestvensky leaves Vigo with all his ships. Four Russian officers—Captain Clado, and Lieutenants Ivan Ellis, Ott, and Schramchenko—left behind.

The King sends for Count Benckendorff.

Meetings between the Prime Minister, Lord Lansdowne, Lord Selborne, Prince Louis of Battenburg, Sir John Fisher, First Sea Lord.

Lord Lansdowne confers with Count Benckendorff.

The *Times*, in a leading article, declares Russia has departed from her engagement in dispatching fleet from Vigo.

The British Fleet at Gibraltar clears for action. Lord Charles Beresford recalls all officers from shore.

Wednesday, November 2.

At the Coroner's inquest at Hull upon the deaths of Smith and Leggott, the jury return a verdict that the two men were killed by shots fired, without warning or provocation, from certain Russian war-vessels at a distance of about a quarter of a mile from their vessel.

Mobilization of troops and ships at Gibraltar ends.

Thursday, November 3.

Admiral Rohzdestvensky arrives at Tangier with four battleships.

Monday, November 7.

The Tzar declares to Admiral Rohzdestvensky that he is with his squadron heart and soul, and that he is certain the misunderstanding will be cleared up.

Tuesday, November 8.

Sir Edward Grey, speaking at Coventry, alludes to the action of the Russian Fleet as an outrage, an outrageous act of folly and outrage.

Wednesday, November 16.

The Board of Trade inquiry, under the Merchant Shipping Act, 1894, ss. 465, 728, into the casualties and loss of life in the North Sea, October 22, begins.

Saturday, November 19.

Board of Trade inquiry adjourns *sine die* after signature of depositions.

November 25.

The Declaration of St. Petersburg signed by England and Russia.

December 22.

First meeting of the North Sea Commission at Paris.

January 9, 1905.

Resumed convention of North Sea Commission.

February 26.

Report of the North Sea Commission published, holding that although Admiral Rohzdestvensky personally did all he could to save the trawlers, he was neither justified in opening nor maintaining fire on the spot.

March 9.

The Russian Ambassador hands to Lord Lansdowne £65,000, being the amount of the indemnity due to the Hull fishermen.

March 24.

Report of the Board of Trade Commission published, assessing the amount of damages at £60,000.

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